

91-775

Supreme Court, U.S.
FILED

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NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

GEORGE KLEINMANN,

Petitioner,

v.

MARIO CUOMO, AS GOVERNOR OF THE
STATE OF NEW YORK, THE STATE OF
NEW YORK AND ARTHUR Y. WEBB, AS
COMMISSIONER OF THE NEW YORK
STATE OFFICE OF MENTAL
RETARDATION AND DEVELOPMENTAL
DISABILITIES,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI
PETITIONER'S BRIEF

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QUESTIONS PRESENTED

I

DID THE SECOND CIRCUIT COURT OF APPEALS
SANCTION A DEPARTURE FROM THE ACCEPTED
AND USUAL COURSE OF JUDICIAL PROCEEDINGS
WHICH CALLS FOR AN EXERCISE OF THE
SUPREME COURT'S POWER OF SUPERVISION?

II

DID THE SECOND CIRCUIT COURT OF APPEALS
DECIDE A QUESTION OF FEDERAL LAW i.e.,
AGE DISCRIMINATION CLAIM, IN A MANNER
WHICH IS IN CONFLICT WITH RULINGS OF
OTHER CIRCUITS AS WELL AS WITH DUE
PROCESS AND EQUAL PROTECTION STANDARDS
ESTABLISHED BY THIS COURT?

PARTIES TO THE PROCEEDINGS

The parties to this petition are the same as the parties to the appeal and civil action below, as reflected in the Caption.

|

TABLE OF CONTENTS

Table of Authorities iv

Jurisdictional Statement 1

Constitutional and
Statutory Provisions 1

Statement of the Case 2

Argument 25

REASONS FOR GRANTING THE PETITION

Point I:

THE SECOND CIRCUIT COURT OF APPEALS HAS
SANCTIONED A DEPARTURE FROM THE ACCEPTED
AND USUAL COURSE OF JUDICIAL PROCEEDINGS
WHICH CALLS FOR AN EXERCISE OF THE
SUPREME COURT'S POWER OF SUPERVISION

Point II:

THE SECOND CIRCUIT COURT OF APPEALS
DECIDED A QUESTION OF FEDERAL LAW
i.e., AGE DISCRIMINATION CLAIM, IN A
MANNER WHICH IS IN CONFLICT WITH
RULINGS OF OTHER CIRCUITS AS WELL AS
WITH DUE PROCESS AND EQUAL PROTECTION
STANDARDS ESTABLISHED BY THIS COURT

Conclusion 64



TABLE OF AUTHORITIES

| | <u>PAGE</u> |
|--|-------------|
| Anderson v. City of Bessemer City, 470 U.S. 564, 573, 105 S. Ct. 1504, 1511, 84 L.Ed 2d 518 (1985) | |
| | 58 |
| Arnett v. Kennedy, 416 U.S. 134, 94 S. Ct. 1633, 40 L. Ed 2d 15 (1974) | |
| | 51-52 |
| Astoria Federal Savings and Loan Association v. Solimino, 111 S. Ct.2166, 111 L.E. 2 96 (1991) | |
| | 39 |
| Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed. 2d 69 (1986) | |
| | 61-62 |
| Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971) | |
| | 50 |
| Berl v. County of Westchester, 849 F. 2d 712 (2d Cir. 1988) | |
| | 57-59 |

Board of Trustees of Keene State
College, et al. v. Sweeney, 439
U.S. 24, 99 S.Ct. 295, 58 L.Ed 2d
216 (1978)

. 56

Booker v. Reavy, 281 N.Y. 318,
23 N.E. 2d 9 (1939)

. 45

Buckley v. Coyle Public School
System, 476 F.2d 92 (10 Cir 1973)

. 54

Cafeteria & Restaurant Workers
Union, Local 473, AFL-CIO v.
McElroy, 367 U.S. 886, 81 S.Ct.
1743, 6 L.Ed. 2d 1230 (1961)

. 50

Calderon v. Martin County, 639 F.2d
271 (5th Cir. 1981)

. 48

Cleveland Board of Education v.
Loudermill, 470 U.S. 532, 105 S.Ct.
1487, 84 L.Ed. 2d 494 (1985)

. 51-52

PAGE

Cleveland Board of Education v.
Loudermill, 488 U.S. 946, 109 S.Ct.
377, 102 L.Ed.2d 365

. 53

Davis v. State University of
New York, 802 F. 2d 638 (2d Cir.
1986)

. 57-58

Dwyer v. Regan, 777 F.2d 825
(2d Cir. 1985), modified at 793 F.
2d 457 (2d Cir. 1986)

. 51-53

Ex Parte Republic of Peru, The
Ucayali, 318 U.S. 578, 63 S. Ct.
793, 87 L. Ed. 1014 (1943)

. 42

Fitzgerald v. Hampton, 152 U.S.
App. D.C. 1, 467 F. 2d 755 (1972)

. 54

PAGE

Goldberg v. Kelly, 397 U.S. 254,
90 S.Ct. 1011, 25 L. Ed.2d 287
(1970)

..... 49
Grausam v. Murphey, 448 F.2d 197
(3rd Cir. 1971)

..... 54

Hagelthorn v. Kennecott Corporation,
710 F.2d 76 (2d Cir. 1983)

..... 60

Hall v. Small Business Administration,
695 F.2d 175 (5th Cir. 1983)

..... 33-34, 36

Health Services Acquisition Corp. v.
Liljeberg, 796 F.2d 796 (5th Cir.
1986)

..... 34-35

Hishon v. King & Spalding, 678 F.2d
1022 (11th Cir. 1982)

..... 48

Homer v. Richmond, 110 U.S. App. D.C.
226, 292 F.2d 719, 722 (1961)

..... 50

PAGE

| | |
|---|-------|
| Hunt v. American Bank & Trust Company of Baton Rouge, Louisiana, 783 F.2d 1011 (11th Cir. 1986) | |
| | 36 |
| Jackson v. Independent School District No. 16 of Payne County, 648 P.2d 26 (S.Ct. OK 1982) | |
| | 28 |
| Kennedy v. Great Atlantic & Pacific Tea Co., 551 F.2d 593, 596 (5th Cir. 1977) | |
| | 36 |
| Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988) | |
| | 33-35 |
| Louisiana, et al. v. United States, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed 2d 709 (1965) | |
| | 47-48 |

Lusardi v. Lechner, 855 F.2d 1062
(3rd Cir. 1988)

. 42, 44

McDonald Douglas Corporation v.
Green, 411 U.S. 792, 93 S. Ct. 1817,
36 L.Ed. 2d 668 (1973)

. 63

Meiri v. Dacon, 759 F.2d 989 (2d Cir
1985) cert. denied, 474 U.S. 829,
106 S.Ct. 91, 88 L.Ed. 2d 74

. 62

Montana v. First Federal Savings
and Loan Association of Rochester,
869 F.2d 100 (2d Cir. 1989)

. 62-63

Mt. Healthy City School Board of
Education v. Doyle, 429 U.S. 274,
97 S.Ct. 568, 50 L.Ed. 2d 471 (1977)

. 57

Neeley v. Board of Trustees,
Policemen's and Firemen's Retirement
System, City of Wichita, 473 P.2d 72,
205 Kan. 780, (S.Ct. Kan. 1970)

. 28

PAGE

Parker v. Connors Steel Company,
855 F. 2d 1510 (11th Cir. 1988)

. 37

R.B. Potashnick v. Port City
Construction Company, 609 F. 2d
1101, rehearing denied, 613 F.2d 314,
cert. denied 449 U.S. 820, 101 S. Ct.
78, 66 L.Ed. 2d 22 (1980)

. 29, 36

Richardson-Merrell, Inc. v. Koller,
etc et al, 472 U.S. 424, 105 S. Ct.
2757, 86 L. Ed. 340 (1985)

. 29-30

Shapiro v. Thompson, 394 U.S. 618,
89 S. Ct. 1322, 22 L.Ed 2d 600 (1969)

. 49

State of Maryland v. Soper, 270
U.S. 9, 46 S.Ct. 185, 70 L.Ed.
449 (1926)

. 41

Swann v. Charlotte-Mecklenburg Board
of Education, et al, 402 U.S. 1,
91 S. Ct. 1267, 28 L. Ed 2d 554
(1971)

. g48

Thompson v. Gallagher, 489 F. 2d
443 (5th Cir. 1974)

. 48-50, 53-55, 58

Times Publishing Company v. Burke,
375 So. 2d 297 (Dist. Ct. of App.
Fla., 2d Dist. 1979)

. 28

United States v. Calabro, 467 F. 2d
973 (2d Cir. 1972)

. 28

United States v. The State of Alabama,
828 F. 2d 1532, 1540 (11th Cir.
1987), per curiam, cert. denied sub.
nom., 487 U.S. 1210, 108 S. Ct. 2857,
101 L. Ed 894 (1988)

. 35-36

PAGE

Weahkee v. Perry, 587 F. 2d 1256
(D.C. Cir. 1978)

. 39

Williams v. General Motors Corporation,
656 F. 2d 120 (5th Cir. Unit B,
1981), cert. denied, 455 U.S. 943,
102 S. Ct. 1439, 71 L. Ed. 2d
655 (1982)

. 60-61

CONSTITUTIONAL

United States Constitution, Amendment 6

. 27, A-737

United States Constitution, Amendment 14,
Section 1

. 48-49, A-738

FEDERAL

Federal Rules of Appellate Procedure,
Rule 35

. 5, 41, A-740

Federal Rules of Appellate Procedure,
Rule 40

. 41, A-743

PAGE

| | |
|--|----------------|
| 28 U.S.C. Section 455 | |
| | 33, A-745 |
| 29 U.S.C. Section 621 et seq. | |
| | 2, 38, A-753 |
| 29 U.S.C. Section 623 | |
| | .47, A-756 |
| 29 U.S.C. Section 631 | |
| | A-759 |
| 42 U.S.C. Section 2000e, et seq | |
| | .47, A-760 |
| Federal Rules of Civil Procedure 52(a) | |
| | .43, 58, A-771 |

STATE:

| | |
|------------------------------|------------------|
| New York State Civil Service | |
| Law Section 80 | |
| | .14-15, A-365(1) |

JURISDICTION

This is a petition for a writ of certiorari on behalf of Appellant George Kleinmann ("Kleinmann") in support of his appeal from District Court judgments dated June 13, 1989, and June 20, 1990, and from judgments of the Second Circuit Court of Appeals on January 18, 1990, January 3, 1991, and February 27, 1991. On May 31, 1991 the Court ex parte granted an extension of time to file a Petition for Writ of Certiorari. This Petition for a Writ of Certiorari is filed pursuant to Rule 10.1(a) of the Rules of this Court.

STATUTORY PROVISIONS AND RULES

Rule 10.1(a) of the Rules of this Court provide in pertinent part:

(a) When a United States court of appeals has rendered a decision in

conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort, or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

There exists a conflict between the Second Circuit and the Fifth Circuit as well as with the Second Circuit itself, with respect to equal protection and due process.

STATEMENT OF THE CASE

Kleinmann challenged acts of Appellees Mario Cuomo, et al. ("State") in laying him off as a violation of the Age Discrimination in Employment Act, 29 U.S.C. Sections 621 et seq. (ADEA). Kleinmann claims he was selected for

layoff because of his age and "opposed" the State's acts, with the result that the State retaliated against him by denying him displacement and recall rights provided to other employees. The State's denial of Kleinmann's rights constituted Age Discrimination.

The Equal Employment Opportunity Commission ("EEOC") found that the State discriminated against Kleinmann on the basis of Age and that the State retaliated against Kleinmann for his opposition to its acts. Kleinmann instituted an action in Federal Court.

After a nonjury trial, the Hon. Con G. Cholakis issued a decision and judgment in favor of the State dismissing Kleinmann's claim that he was laid off because of his age but did not address the retaliation claim.

The first appeal addressed the dismissal of the age discrimination claim and the District Court's failure to address the retaliation claim. The Second Circuit Court of Appeals remanded to the District Court for specific findings on the retaliation claim. The second appeal was from the June 20, 1990 District Court Judgment which found no basis for the retaliation claim and District Court decision dated June 13, 1989, which found no basis for the age discrimination claim.

The Second Circuit Court of Appeals affirmed the District Court without opinion by Order dated January 3, 1991. Appellant filed a Motion for Reargument pursuant to Rule 40 of the Federal Rules of Appellate Procedure. The Second Circuit Court of Appeals did not render a

decision on the Motion for Reargument but did act on an application for a rehearing en banc pursuant to Rule 35 of the Federal Rules of Appellate Procedure. By Order dated February 27, 1991, the Second Circuit Court of Appeals denied the application for a rehearing en banc but did not rule on the original Rule 40 Motion for Reargument. On March 11, 1991, the Second Circuit Court of Appeals issued a third decision which appears to have been a copy of the first page of the January 3, 1991 decision.

STATEMENT OF FACTS

On May 4, 1983, George Kleinmann was laid off from his position with the State of New York. Prior to that he worked as an Administrative Assistant with the Office of Mental Retardation and

Developmental Disabilities ("OMRDD"), an agency of the State of New York (A-6-7, 20, 238).* At the time of his layoff Kleinmann was 57 years old with 20 years of State service (A-9, 20).

For many years Kleinmann worked in OMRDD's Albany, New York central office and in the years immediately prior to 1982, had applied for some 27 promotions. In each instance, except one, Kleinmann was never given an interview, despite being qualified (A-5, 11). In at least one instance he complained to OMRDD's Affirmative Action Officer of being excluded from promotional

* All references to Appendix will be made by referring to "A" followed by the page number, i.e. (A-1).

opportunities because of his age (A-5, 11; 19-21). Kleinmann submitted that his immediate supervisor at the time, Henry Radzminski, was at least partially responsible for the lack of promotional opportunities (A-11). That protest resulted in Kleinmann getting his one and only interview.

In January, 1982, Kleinmann became aware that his entire office would be moved to another location in Albany. Kleinmann's immediate supervisor, Radzminski, also would be transferred to the new location as part of the move (A-536-537). In an effort to avoid changing work locations and, in the process, work under supervision of a different person, Kleinmann received a job transfer; Kleinmann and a Clyde Niles exchanged job items (position) (A-153,

157, 586). At that time Niles was a Senior Administrative Assistant, a Civil Service Grade 23 item. Kleinmann's item was Administrative Assistant, Grade 18. They simply changed job assignments and their respective salaries were not adjusted (A-312-316, 414-417, 541-544). The transfer resulted in Kleinmann remaining in the same office location, but with a new supervisor, Robert Norris (A-589).

Kleinmann continued to assume the duties formerly performed by Niles until being assigned to another supervisor, Thomas Cuite (A-7). Cuite came from outside OMRDD and had no previous exposure to the work performance of either Kleinmann or Niles (A-577, 582-586). On January 3, 1983, Cuite informed Kleinmann of a reassignment effective

January 5, 1983, to work under former supervisor, Radzminski (A-7, 20-21, 588-589, 663-664) which required Kleinmann to change work locations. Niles also was reassigned to Niles' former job function and work location. Kleinmann met with McKinley Jones, OMRDD Affirmative Action Officer, to protest that his reassignment constituted an act of age discrimination. Kleinmann asked the Affirmative Action Officer to investigate this claim (A-21) and filed a grievance on January 4, 1983 challenging the reassignment (A-21-22) which was later amended to specifically include a reference to the Union Contract clause prohibiting age discrimination. OMRDD claims some confusion as to the date that they received this amendment. The State admits that it was received no later than March 2, 1983 (A-24). That

grievance was further supplemented on March 18, 1983 with another grievance filed under Kleinmann's Union Collective Bargaining Agreement, specifically charging OMRDD with a violation of the Union Contract clause prohibiting age discrimination (A-24-25). The March 18, 1983, age discrimination grievance was filed with OMRDD directly (A-24).

On January 3, 1983, Kleinmann began what would become a three-month medical leave of absence (A-21), the State's doctors corroborated that the medical leave was needed due to job stress surrounding reassignment of January 3, 1983 (A-21).

In late January, 1983, the State of New York announced a planned series of layoffs to address budget difficulties. This set in motion a timetable wherein

each State agency, including OMRDD, submitted proposals for staff cuts to the State Division of the Budget for approval, modification or disapproval. The Division of the Budget is a State entity wholly separate from OMRDD which ultimately determines whether a particular position (item) will be abolished (A-598-599).

At that time there were four fully funded and budgeted Administrative Assistant positions in OMRDD, as well as one fully funded and budgeted Senior Administrative Assistant position which was filled by Clyde Niles, the same position that Kleinmann had performed satisfactorily up to January 3, 1983. Niles was younger than Kleinmann (A-11) and had less seniority with State government.

Of the four remaining Administrative Assistant positions, one was filled by Kleinmann, another by a Ms. Ziemke, also younger and with less seniority than Kleinmann (A-12-13, 220-224, 238). The remaining two positions were fully funded but vacant, held for two people who, at that time, were provisionally appointed to other positions: A. Hass serving as a provisional Grade 23, Contract Management Specialist, and D. Gerrish, provisional Assistant Director of County Services, Planning and Administration (A-595, 605-606).

The District Court found that OMRDD abolished the Administrative Assistant positions of both Kleinmann and Ziemke (A-13), however, the evidence at trial revealed that only Ziemke's position was abolished. The State Division of the

Budget did not approve the abolishment of Kleinmann's position as shown in Exhibit 69, official form issued by the Budget Division for either approving or disapproving OMRDD's plan (A-133-134) since Kleinmann's line item is not included (A-442-443). This fact is critical, OMRDD did not follow State Law in laying off Kleinmann.¹

It was revealed finally that OMRDD originally sent out a total of 29 layoff letters to employees based in its Albany main office. Kleinmann, age 57, was the only person actually laid off in a program division of 147 people (A-654, 684, 704-709). The record proves this was no accident.

The process followed by OMRDD to insure that Kleinmann was denied the "bumping," "retreat," and "recall"

rights afforded other employees scheduled for layoff is the centerpiece of Kleinmann's claim of age discrimination and claim of retaliation.

TARGETING FOR LAYOFF

Under New York State Civil Service Law, an employee whose position is eliminated in a layoff has "bumping", "retreat" and "recall" rights. A significant portion of the District Court trial was spent in demonstrating the difference between these three rights.

"Bumping" refers to rights of a employee selected for layoff to displace another employee with fewer years of State service in the same Civil Service job title and in the same layoff unit. (See New York State Civil Service Law Section 80 at A-365(1)). Kleinmann was

an Administrative Assistant, or Junior Administrative Assistant in OMRDD in Albany, New York, and had the right to displace any Administrative Assistant who had fewer years of service, as long as such position was in Kleinmann's layoff unit (A-704-709). The layoff unit for Kleinmann included the Central Office payroll and two other OMRDD facilities in the area surrounding Albany. At the time of the layoff there was one other Administrative Assistant but no Junior Administrative Assistants in Kleinmann's layoff unit. The second Administrative Assistant job was abolished. When OMRDD told Kleinmann he would be laid off, he had no one to "bump," even though two Administrative Assistant positions with OMRDD remained vacant and funded after the layoff. Under Civil Service Law,

Kleinmann did not have the right to bump into the Senior Administrative Assistant title even though he had performed that precise job until January 3, 1983.

Civil Service Law also gave Kleinmann the right to "retreat" or displace persons with fewer years of State Service who were in positions which he had previously filled. At least one such position in OMRDD was denied Kleinmann.

Finally, once Kleinmann was laid off he had "recall" rights to any open position in State service for which he was eligible. Specific job titles Kleinmann was eligible for were published by the New York State Department of Civil Service. This is called a "preferred list," (A-446-453), a compilation of positions having the same or similar job duties as an Administrative Assistant.

Kleinmann ultimately claimed a position from this recall list. However, there was at least one "same" or similar job which was denied Kleinmann to which he should have been appointed at the time of his layoff.

Kleinmann's discrimination claim focuses on the decision to eliminate his position as Administrative Assistant. The State laid off all persons holding Administrative Assistant items in Kleinmann's layoff unit, however, only one position was abolished. Thus under the State's theory, accepted by the District Court, since both Administrative Assistant positions were eliminated, Kleinmann could not prove that his age was the determining factor in deciding who would remain after he was laid off. This theory is based on an inappropriate

standard of proof for a layoff case (A-714-716).

The District Court did not recognize proof that the State specifically targeted Kleinmann's job. By surgically targeting Kleinmann's position the State then raised the Civil Service Law as a shield. The District Court erred by not addressing the critical steps taken in initially targeting Kleinmann (A-701-714).

The proof is clear starting with the admission by the person who targeted Kleinmann's job for layoff, Cuite. When Cuite targeted Kleinmann he believed that Kleinmann was the only person who held the position of Administrative Assistant, that Kleinmann would therefore be laid off if the Administrative Assistant position was eliminated (A-701-714). Cuite also knew that he was under no

obligation to select any particular job title for elimination, nor was he given a quota of people for layoff (A-701-702). Kleinmann was targeted even though vacant positions could have been abolished, which would have accomplished precisely the same budgetary savings (A-598-599).

Cuite similarly could have eliminated the Senior Administrative Assistant position, which would have given incumbent Clyde Niles the right to bump any less senior person in either the Administrative Assistant or Junior Administrative Assistant positions. Under this scenario Kleinmann, being more senior, would not have been laid off.

OMRDD could have eliminated other job positions, many held by probationary and/or provisional people (A-428-429, 559-563). A probationary or provisional

employee is afforded only limited rights under State law and has less rights vis-a-vis Kleinmann than a "permanent" employee. Under any of these alternatives Kleinmann would not have been laid off since he was older and had more years of service.

By targeting only Kleinmann's job, Cuite erected the shield of the Civil Service Law because Kleinmann was not eligible to bump Niles in the higher grade position, and there was no one in the Junior Administrative Assistant position to bump. Niles was younger and less senior than Kleinmann (A-600).

The evidence before the Court revealed that Kleinmann was on "approved" sick leave from January through April, 1983. During this time he had filed two formal grievances challenging his reassignment

as a form of discrimination (A-163-200). Cuite stated he made the decision to target Kleinmann for layoff, knew about the sick leave (A-597-598) and that Kleinmann had filed grievances challenging Cuite's decision to reassign him. Nevertheless, Cuite marked Kleinmann's position for layoff, knowing that Kleinmann was the only person who would be laid off because of abolishment of the Administrative Assistant position (A-700-702). The District Court ignored the lack of evidence that the abolishment of Kleinmann's position was approved by the Division of the Budget. Finally, Cuite targeted Kleinmann's position although there were many vacant, funded positions in OMRDD, including federally-funded items. Elimination of these positions would have had the same effect

on the budget (A-689-700).

RETALIATION

There is no doubt that by March 18, 1983, both Raymond Rockwell, OMRDD Assistant Director of Personnel, and Charles Devane, OMRDD Director of Human Resources, were aware of Kleinmann's two formal reassignment and age discrimination grievances (A-614-629, 647).

By the time the initial determination was finalized in April, Kleinmann had filed two grievances and had formally complained to the Affirmative Action Officer.

After receiving both grievances, Rockwell also took steps to deprive Kleinmann of his right to claim the Computer Programmer position transferred to OMRDD, effective April 1, 1983. This

was a Grade 18 position occupied by a probationary appointee serving in the position as a Grade 14 (A-25). There is no dispute that Kleinmann was entitled to the position (A-25) or that he was entitled to the position until the May 4, 1983 effective date of his layoff from his Administrative Assistant position. There is no dispute that normal practice at OMRDD at that time was to notify an employee of retreat position to allow opportunity to think about the position and claim it two weeks prior to effective date of layoff (A-593, 721). This two-week time frame would have placed the normal notification date at April 20, 1983, giving Kleinmann two weeks to consider whether he would accept position prior to May 4, 1983, layoff date.

Kleinmann was orally informed about

retreat position on March 18, 1983, by Rockwell and told Rockwell that he wanted to think about it. Rockwell then sent Kleinmann a letter dated March 23, 1983, stating "we consider you to have declined the retreat option." Kleinmann actually accepted the retreat item in writing on April 7, 1983 (A-721). The State treated Kleinmann in a discriminatory manner by failing to allow him the customary two week acceptance period.

Despite the fact that Kleinmann accepted the position approximately three weeks before it was to take effect, and two weeks prior to the State's usual timetable for even notifying a person of retreat rights, the State refused to permit Kleinmann to retreat. The State kept a probationary employee significantly younger than Kleinmann in a

position Kleinmann was entitled to occupy (A-27).

Kleinmann was also deprived of his right to displace, Bonnie Raines, a provisional M.R. Program Planner I (A-24-25) who was significantly younger than Kleinmann (A-27). Despite her provisional status in a position Kleinmann was clearly qualified to perform, Raines remained in the provisional position and the State laid off Kleinmann.

POINT I

THE SECOND CIRCUIT COURT OF APPEALS SANCTIONED A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS WHICH CALLS FOR AN EXERCISE OF THE SUPREME COURT'S POWER OF SUPERVISION

The instant case is marked by a complex procedural record. This case has been subject to extensive legal

proceedings, both administrative and judicial all marked by inadequacies, inconsistencies and errors which serve only to continue to deprive Kleinmann of his Constitutional rights of due process, equal protection of the law, and right to property. These rights have been denied Kleinmann because he happened to be a 57 year old man, in a State funded item, who somehow did not meet the personal criteria of a new Deputy Commissioner, Cuite (A-654).

One of the basic elements of due process is the right to a competent, effective counsel of choice. Before the close of Plaintiff's case, mid-way in the trial, Kleinmann petitioned the Court on the record for a continuance for the purpose of obtaining new trial counsel (A-501-514). Kleinmann's request was

denied by District Court Judge Cholakis on the record (A-514-515). Kleinmann's statements on the record clearly established a basis for his dissatisfaction with his then trial counsel.

Kleinmann was the party seeking redress, the one who would be prejudiced by any further delay in the case; therefore, a continuance sought by the party whose position would be in even the slightest jeopardy of damage caused by further delay, should have been given benefit of the short continuance requested (A-501-514). Although most cases dealing with requested continuances relate to criminal matters, the Sixth Amendment issues and the basic right to counsel are applicable to instant action.

In United States v. Calabro, 467 F.2d

973 (2d Cir, 1972), the Second Circuit Court of Appeals pointed out, that issue of waiver of right of counsel must be determined on a case by case basis. Id at 985. Cases in numerous state courts across the country have stressed the litigant's right to be fully represented in civil as well as criminal cases as a basic constitutional right. Times Publishing Company v. Burke, 375 So.2d 297 (Dist. Ct. of App. Fla., 2d Dist 1979); Neeley v. Board of Trustees, Policemen's and Firemen's Retirement System, City of Wichita, 473 P.2d 72, 205 Kan. 780, (S.Ct. Kan. 1970); Jackson v. Independent School District No. 16 of Payne County, 648 P.2d 26 (S.Ct. OK. 1982). The right of the civil litigant to such independent counsel as a basic right of due process cannot be abridged,

even during the course of a trial. The right of a civil litigant to consult freely with counsel during the course of trial, when abridged by action of the trial court in the way of limitation of such free access, has been held to constitute an infringement on the right to counsel. R.B. Potashnick v. Port City Construction Company, 609 F.2d 1101, rehearing denied 613 F.2d 314, cert. denied 449 U.S. 820, 101 S.Ct. 78, 66 L.Ed.2d 22 (1980).

This Court in Richardson-Merrell, Inc. v. Koller, etc, et al. 472 U.S. 424, 105 S.Ct. 2757, 86 L.Ed 2d 340 (1985) concerning the right to counsel of ones choice at pages 438 and 439 stated

...If the nature of the right to representation by counsel of one's choice is that "[it] is not violated absent some specifically demonstrated prejudice," *ibid*, then a disqualification order, though

"final", is not independent of the issue to be tried. Only after assessing the effect of the ruling on the final judgment could an appellate court decide whether the client's rights had been prejudiced. If respondent were to proceed to trial and there receive as effective or better assistance from substitute counsel than the disqualified attorney could provide any subsequent appeal of the disqualification ruling would fail.

This Court went on in Richardson-Merrell, Inc. v. Koller, et al. to conclude that an order disqualifying counsel in a civil case can not be completely separated from the merits. Action of the District Court with regard to denial of Kleinmann's request for time to obtain new counsel is inextricably tied to merits of this action and directly contributes to denial of due process to Kleinmann which permeates this case.

Other aspects of this case at trial level raise the possibility of conflicts

of interests which are so interwoven in the merits of this case that they warrant further review by the Court.

Maeve Tooher, Law Clerk to Judge Cholakis at time of Kleinmann's June 1989 trial, was married to Terrence Tracy, an attorney employed by the office of the Attorney General of the State of New York. This fact did not become known to Kleinmann until after trial concluded. Since the State was and is a party defendant to this litigation and was and is defended by the office of the Attorney General of the State of New York, the appearance of potential conflict exists.

This same clerk of District Court Judge Cholakis was subsequently employed by the firm originally handling the appeal for Kleinmann. This fact was disclosed to Kleinmann after he had

retained this new counsel and the appeal process had begun. Kleinmann was told that a "chinese wall" would be built around the attorney handling the appeal so that no conflict or appearance of conflict of interest would be possible. Kleinmann reluctantly acquiesced based upon those assurances. Only when Kleinmann became aware that Ms. Tooher was the counsel assigned to represent Clyde Niles, the individual who had originally displaced Kleinmann from his position as administrative assistant to Cuite, did Kleinmann decide to remove the case from the appellate counsel then representing him.

The appearance of conflict has permeated this record, particularly with respect to District Court Judge Cholakis' law clerk. This Court has stated, in

relation to 28 U.S.C. Section 455, the importance of promoting public confidence in the integrity of the judicial process. Finding in the case of Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988), that scienter is not required to find a violation of Section 455(a), this Court enunciated the rule that:

The judge's lack of knowledge of a disqualifying circumstance may bear on the question of remedy, but it does not eliminate the risk that "his impartiality might reasonably be questioned" by other persons. . . . Moreover, advancement of the purpose of provision to promote public confidence in the integrity of the judicial process, . . . does not depend upon whether or not the judge actually knew of facts creating an appearance of impropriety, so long as the public might reasonably believe that he or she knew. Liljeberg, 486 U.S. 847, 108 S.Ct. 2194, at 2202-2203 (citations omitted).

The Fifth Circuit in the case of Hall v. Small Business Administration, 695 F.2d

175 (5th Cir. 1983) vacated the judgment entered by a magistrate based on a finding that the magistrate's law clerk had accepted employment with a law firm representing the plaintiffs in that case. No suggestion of actual impropriety was found in that case; however, the court held that the magistrate's failure to recognize that his law clerk's conflict of interest created an appearance of impropriety which was adequate cause for reversal. In following the Hall decision, the Fifth Circuit in Health Services Acquisition Corp. v. Liljeberg, 796 F.2d 796 (5th Cir. 1986) (the lower court holding in the Liljeberg, 486 U.S. 847 case), the Circuit Court of Appeals stated:

Where a reasonable person would only speculate that a judge might have actual knowledge of the facts, constructive knowledge does not exist.

In the present case, however, an objective observer would firmly expect that Judge Collins would have actual knowledge of Loyola's [his clerk's] interest in the case.

Health Services Acquisition Corp., 796

F.2d at 802. The same is true in the instant case, an objective observer would firmly expect that Judge Cholakakis would have actual knowledge of his clerk's possible interest in and potential conflict involving the Kleinmann action.

This Court has again confirmed the need for diligence by judges with respect to such potential conflicts and has enunciated the principle that when a judge harbors any doubts concerning whether or not his disqualification is required, this should be resolved in favor of disqualification. United States v. The State of Alabama, 828 F.2d 1532, 1540 (11th Cir. 1987), per curiam, cert

denied sub. nom., 487 U.S. 1210, 108 S.Ct. 2857, 101 L.Ed.2d 894 (1988).

In the case of Hunt v. American Bank & Trust Company of Baton Rouge, Louisiana, 783 F.2d 1011 (11th Cir. 1986), the court set forth an appropriate yardstick to measure such appearance of impropriety:

Absent actual bias, disqualification is necessary only if a reasonable person, knowing all the circumstances, would harbor doubts about the judge's impartiality. R.B.Potashnick v. Port City Construction Co., 609 F.2d 1101, (5th Cir.), rehearing denied, 613 F.2d 314, cert. denied, 449 U.S. 820, 101 S.Ct. 78, 66 L.Ed.2d 22 (1980). It is true that a reasonable person might wonder about a law clerk's impartiality in cases in which his future employer is serving as counsel. Clerks should not work on such cases, just as a judge should not hear cases in which his business associates are involved. A "clerk is forbidden to do all that is prohibited to the judge." Hall v. Small Business Administration, 695 F.2d 175, 179 (5th Cir. 1983); see also Kennedy v. Great Atlantic & Pacific Tea Co., 551 F.2d 593, 596 (5th Cir. 1977). Hunt, 783 F.2d at 1015.

The factual pattern in the case of Parker v. Connors Steel Company, 855 F.2d 1510 (11th Cir. 1988) is very similar to the occurrence at the trial level in the instant case. In Parker, the clerk in question was the son of a partner in the law firm representing defendants Connors and H.K. Porter. Here, the law clerk in question was the wife of a member of defense counsel's legal staff, and also, by implication of employment, one of the named defendants. In Parker, the court stated:

A law clerk, as well as a judge should stay informed of circumstances that may raise the appearance of impartiality or impropriety. And when such circumstances are present appropriate actions should be taken. Parker, 855 F.2d at 1525.

It would be hard to believe that Maeve Tooher was not aware of her marriage to Terrence Tracy and the job which he held

with the State of New York.

These possible conflicts are inextricably tied to the merits of the case and the results below. While singly they may not constitute reversible error, together the cumulative prejudice to Kleinmann's rights is obvious.

Other procedural missteps further underscore the need for this Court to exercise its supervisory authority. EEOC issued a finding that a violation of Kleinmann's rights occurred in the manner in which his layoff was effected (A-233-240), violating the Age Discrimination in Employment Act (ADEA, 29 USC. Sections 621 et seq.) The regional office of the EEOC in Buffalo originally had prepared a draft complaint to intervene in Kleinmann's already pending suit (A-356-361), but was overruled by a vote of the

members of the Commission in Washington, D.C. . This action, combined with the failure of the District Court to give any weight whatsoever to the EEOC determination, raises a question of undue influence.

While an EEOC determination is not binding on a District Court, it should be accorded some weight. Weahkee v. Perry, 587 F.2d 1256 (D.C. Cir. 1978). This Court has recently discussed the weight to be accorded the decision of a State Agency in Astoria Federal Savings and Loan Association v. Solimino, 111 S.Ct. 2166, 111 L.ed.2 96 (1991).

Administrative determination of either a State or Federal agency, while not conclusive upon the District Court, must be accorded some weight in its decision. The Court below failed to accord any

weight to the EEOC determination and failed to explain why it ignored this determination. Such a finding, or lack thereof, effectively precludes Kleinmann from attaining a complete and proper appellate review.

Complicating the procedural maze created by this case are the issues created by the handling of the matter on appeal. After first remanding to the District Court for further findings, the Second Circuit then denied Kleinmann's appeal without decision. This was further complicated when the Second Circuit Court failed to make any decision regarding Kleinmann's ~~pending~~ Rule 40 motion.

Dealing with the issue of failure of the Second Circuit to render a decision with respect to the still pending Rule 40

motion for reargument, in the event that this Court does not grant Kleinmann's petition for certiorari, appellate review will be defeated if a writ of mandamus does not issue. State of Maryland v. Soper, 270 U.S. 9, 29-30, 46 S.Ct. 185, 70 L.Ed. 449 (1926). The Second Circuit never has issued any decision relating to the original Rule 40 Motion for Reargument. The issuance of a decision by that Court in relation to a Rule 35 Motion for Rehearing En Banc does not resolve the matter of the underlying and still outstanding Rule 40 Petition for Regargument. Pursuant to the Federal Rules of Appellate Procedure, Kleinmann's filing was for a Reargument. The ruling on a Rule 35 Petition for Rehearing En Banc in no way vitiated that original filing and the underlying nature of the

original motion.

In instances in which no other adequate means of attaining relief is available to a party litigant, this Court has held that a writ in the nature of mandamus is an appropriate remedy. Ex Parte Republic of Peru, The Ucayali, 318 U.S. 578, 63 S.Ct. 793, 87 L.Ed. 1014 (1943). In Lusardi v. Lechner, 855 F2d 1062, (3d Cir. 1988) at 1069, the Court pointed out that when the court below has committed an error of law, such writ may issue. Although the general rule that a writ of mandamus will not issue for the purpose of controlling the exercise of judicial discretion, such writ may issue for the purpose of compelling the exercise of such judicial discretion.

The issue of the law of the case set forth in Judge Cholakakis' decision compels

the exercise of discretion in favor of the granting of the writ of mandamus. In his decision dated June 20, 1990, Judge Cholakis, as the law of the case found:

FOURTH: This court does not necessarily pass upon the correctness of the decisions made by the state agencies but merely determines whether their actions were retaliatory in nature. (A-29)

The issues before Judge Cholakis required a determination by the trier of fact in a trial de novo as to the correctness of the decisions. (Federal Rules of Civil Procedure 52(a) A-771)). This determination required the Second Circuit, on appeal, to direct its attention to this issue, as set forth in Appellant's brief below. Failure to address this issue left Judge Cholakis' determination as the law of the case, which, when coupled with the above mentioned EEOC Letter Decision (A-233-

240), is another compelling basis upon which the request for the grant of this petition for certiorari and upon which the granting of a writ of mandamus is founded. The Third Circuit Court of Appeals in Lusardi, 855 F.2d 1062, considered issues of procedural fairness related to age discrimination cases and pointed to such problems not being cured by mere language. Kleinmann has been denied such procedural fairness at all stages of this proceeding and the granting of this petition for certiorari or writ of mandamus properly would issue from this Court as a partial remedy in an attempt to cure such basic procedural defects.

Finally, if the petition for certiorari is denied, then mandamus is a proper remedy based on the failure of the

State of New York to enforce its Civil Service Laws. By the very testimony of the State's own employees, neither Kleinmann's name nor job line item number appeared on the form BD-98 (A-132-135) required to effectuate his layoff (A-41-59). These acts of those in authority to execute the Civil Service Laws and promulgated rules by the Department of Civil Service and by the Division of the Budget, by way of implementation (A-247-355) clearly are ministerial in nature. Although these cases generally are considered in state courts, the same issues are applicable in federal cases where no other adequate remedy is available. Booker v. Reavy, 281 N.Y. 318, 23 N.E. 2d 9 (1939).

If a writ of certiorari is not granted, Kleinmann has no other avenue

open to him to compel the Second Circuit to render a decision with respect to his Rule 40 Motion for Reargument; to compel the lower court to adhere to the law of this case as set forth in the decision of District Court Judge Cholakis, and finally to compel enforcement of Civil Service Laws mandated for enforcement in the State of New York, subject to the regulation of the EEOC as set forth in its letter opinion (A-238-240) dealing specifically with age discrimination found to have occurred in the firing/termination of Kleinmann.⁶¹

POINT II

THE SECOND CIRCUIT COURT OF APPEALS DECIDED A QUESTION OF FEDERAL LAW i.e., AGE DISCRIMINATION CLAIM, IN A MANNER WHICH IS IN CONFLICT WITH RULINGS OF OTHER CIRCUITS AS WELL AS WITH DUE PROCESS AND EQUAL PROTECTION STANDARDS ESTABLISHED BY THIS COURT

The Equal Employment Opportunity Act

of 1972 placed public employers, including States and municipalities "employers" within the meaning of 42 U.S.C. Section 2000e, et seq. Extending further federally-based protection to public employees, the Age Discrimination Employment Act, 29 U.S.C. Section 623(d) also affords federally based protection to employees in the public sector. These statutes constitute the foundation of rights establishing the firm basis of Kleinmann's claims.

Acceptance of Federal funding for other parties by the employer herein granted Kleinmann the protection of the Equal Protection Clause regardless of, and in this case despite, State Law.

Louisiana, et al. v. United States, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed 2d 709 (1965); Swann v. Charlotte-Mecklenburg

Board of Education, et al., 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed 2d 554 (1971); Hishon v. King & Spalding, 678 F. 2d 1022 (11th Cir. 1982); Calderon v. Martin County, 639 F. 2d 271 (5th Cir. 1981). Discriminated against on the basis of age, retaliated against for asserting rights, and permanently impeded in exercising State contract rights, Kleinmann was fired under color of fiscal responsibility while two (2) vacant Administrative Assistant positions remained fully budgeted and funded (A-646-647, 679-682, 702-715).

In Thompson v. Gallagher, 489 F. 2d. 443, (5th Cir. 1974), the court considered issues of equal protection and due process under the Fourteenth Amendment and dealt with the issue of a state action under the color of state law

as constituting a bill of attainder prohibited under the Constitution. In that case, the propriety of a municipal ordinance requiring that only those honorably discharged from the military be hired by the city if such employees or prospective employees had ever served in the military was considered. Addressing the question of whether or not a public employee had an interest in his job which was Constitutionally protected the Court held:

The Fourteenth Amendment is a general prohibition against arbitrary and unreasonable government action. It no longer suffices to say that although a government may not deprive someone of a right arbitrarily, it may do so in the case of a privilege. Goldberg v. Kelly, 397 U.S. 254, 262, 90 S. Ct. 1011, 25 L.Ed. 2d 287 (1970), Shapiro v. Thompson, 394 U.S. 618, 627 n. 6, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969). The right-privilege distinction has been rejected as a method of analysis in Fourteenth Amendment cases, because the question is not whether a person has a right to

something denied by the government, but whether the government acted lawfully in depriving him of it. Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed. 2d 90 (1971), and cases cited therein at 539, 91 S. Ct. at 1598, "One may not have a constitutional right to go to Baghdad, but the government may not prohibit one from going there unless by means consonant with due process of law." Homer v. Richmond, 110 U.S. App. D.C. 226, 292 F. 2d 719, 722 (1961), cited in Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, 894, 81 S.Ct. 1743, 6 L. Ed. 2d 1230 (1961). Thompson, 489 F.2d at 446.

Kleinmann has not asked to "go to Baghdad", but has asked to keep his job, the job which the State has admitted he performed satisfactorily (A-9) and which the State, also by its own admission (A-132-134) never abolished.

The Second Circuit Court of Appeals implicitly found that there was no violation of Kleinmann's rights. That Court in so holding clearly violated its own standard established in Dwyer v.

Regan 777 F.2d 825 (2d Cir. 1985)
modified at 793 F.2d 457 (2d Cir. 1986).
In that case, while not involving an
allegation of age discrimination, the
Court stated at p. 830 (777 F.2d 825)
quoting from this Court in Cleveland
Board of Education v. Loudermill 470 U.S.
532, 105 S.Ct. 1487, 1491-92, 84 L.Ed. 2d
494 (1985):

The point is straightforward: The Due
Process Clause provides that certain
substantive rights--life, liberty, and
property--cannot be deprived except
pursuant to constitutionally adequate
procedures. The categories of
substance and procedure are distinct.
Were the rule otherwise, the Clause
would be reduced to a mere tautology.
"Property" cannot be defined by the
procedures provided for its
deprivation any more than can life or
liberty. The right to due process "is
conferred, not by legislative grace,
but by constitutional guarantee.
While the legislature may elect not to
confer a property interest in [public]
employment, it may not
constitutionally authorize the
deprivation of such an interest, once
conferred, without appropriate
procedural safeguards." Arnett v.

Kennedy, supra, 416 U.S. [134,] 167, 94 S.Ct. [1633,] 1650 [40 L.Ed.2d 15] [(1974)] (Powell, J., concurring in part and concurring in result in part); see id., at 185, 94 S.Ct., at 1659 (White, J., concurring in part and dissenting in part).

In Dwyer, the Second Circuit found that a permanent (civil service) State employee would have the right to a due process hearing provided that employee could establish that he had been targeted for a termination (layoff is the equivalent) and had actually demanded such a hearing.

Kleinmann was a permanent employee in the classified civil service and has demonstrated that his position was targeted for layoff (termination). He also requested every type of available administrative remedy. Kleinmann's rights are not less than Mr. Dwyer who happened to be an attorney. The unusual procedures followed by the Second Circuit

in this case as set forth herein, would seem to be applying a different standard than that Circuit did in Dwyer as well as a standard in conflict with that applied by the Fifth Circuit Court of Appeals in Thompson v. Gallagher, 489 F.2d 443. As in most of the other proceedings found below in this tangled procedural web, the standard applied to Kleinmann is different and in violation of his rights to due process and equal protection Cleveland Board of Education v. Loudermill, 488 U.S. 946, 109 S.Ct. 377, 102 L.Ed 2d 365. In accordance with its own newly adopted rules and regulations, the State violated Kleinmann's rights. Issuing to Kleinmann, in the form of the fabricated BD-98 (A-457, 462-480), a form of a bill of attainder, the monolithic State trampled the rights and privileges

of its citizen.

Kleinmann's choice of becoming a public employee did not relinquish his constitutionally guaranteed rights.

...[J]ust as a public employee does not give up his First Amendment rights when he begins receiving a pay check from the government, neither does he give up his right to due process of law. The Fourteenth Amendment stands for the proposition that the government must act, when it acts, in a manner which is neither arbitrary nor unreasonable. This stricture is in addition to those which restrict the government from acting in a manner which impinges on freedom to speak or associate, or to be free from self-incrimination. It is one which most certainly applies not only to the government as policeman but also to the government as employer. Public employees are every bit as protected by the Fourteenth Amendment's safeguards as is the rest of the populace. Grausam v. Murphey, 448 F. 2d 197 (3 Cir.1971), Buckley v. Coyle Public School System, 476 F.2d 92 (10 Cir., 1973), Fitzgerald v. Hampton, 152 U.S. App. D.C. 1, 467 F. 2d 755 (1972). Thompson v. Gallagher, 489 F. 2d at 447.

The District Court found that failure to reinstate Kleinmann was result of

determination of non-comparability by the Department of Civil Service and not resulting from any retaliatory intent by the State, (A-26) however, Kleinmann's position was not abolished as proven by Exhibit 69. (A-132-135).

The Court held in Thompson v. Gallagher:

The question is whether the challenged statute is a rational means of advancing a valid state interest. A regulation not reasonably related to a valid government interest may not stand in the face of a due process attack. Likewise, a classification which serves no rational purpose or which arbitrarily divides citizens into different classes and treats them differently violates the equal protection clause. Thompson v. Gallagher, 489 F.29 at 447.

It is unknown if a valid governmental interest exists or is at stake in the instance case. The entire question of force reduction was handled through

Departmental directive (A-41-59, 247-355), the ground rules for handling of all cases of force reduction were set forth in governmental directives (A-247-355) and required administrative steps for implementation were enumerated. Kleinmann was singled out for special treatment.

The burden of going forward with evidence of legitimate, non-discriminatory reasons for Kleinmann's layoff was not met. As this Court held in Board of Trustees of Keene State College, v. Sweeney, 439 U.S. 24, 99 S. Ct. 295, 58 L. Ed 2d 216 (1978), Plaintiff has the right, after the articulated "legitimate" business reason is proffered by Defendants, to show that either the alleged reason was not valid or that those alleged reasons were a

cover-up or pretext. Cuite's testimony (A-575-720) on its face, cannot stand this test. By his own testimony, Cuite established his manipulation of Kleinmann into the position from which Kleinmann could be targeted, and was targeted again by Cuite for layoff. Kleinmann, meeting the test of Mt. Healthy City School Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L. Ed. 2d 471 (1977) succeeded in proving that an illegitimate reason played a part in the State's motivation and it failed to come forward with any proof that this adverse action would have been taken in the absence of the proven illegitimate reason. Berl v. County of Westchester, 849 F.2d 712 (2d Cir. 1988); Davis v. State University of New York, 802 F.2d 638 (2d Cir. 1986).

Clearly the lower Court erred in its

factual finding with respect to Kleinmann's proof in relation to this matter. Although Kleinmann now has a heavy burden to meet the test set forth in Fed. R. Civ. P. 52(a), this clearly has been met and surpassed. The Second Circuit in Berl v. County of Westchester, 849 F.2d at 715 succinctly stated,

"...we may overturn it only if we are left 'with the definite and firm conviction that a mistake had been committed.' Anderson v. City of Bessemer City, 470 U.S. 564, 573, 105 S. Ct. 1504, 1511, 84 L.Ed.2d 518 (1985)."

In this matter, a mistake has been committed.

The EEOC found that the layoff was in violation of federal statute prohibiting age discrimination. Kleinmann's firing as in the Thompson v. Gallagher case, 489 F.2d at page 448, "...not only fails to further the purposes of the act, it actually subverts them."

In Berl v. County of Westchester, 849 F.2d at page 715 that Court recognized, "Evaluation does not occur in a vacuum." Kleinmann's layoff did not occur in a "vacuum" rather it occurred as part of a carefully orchestrated plan of both discrimination and retaliation, documented by the State's witness, Cuite. The plan of discrimination was documented in writing for Cuite by Rockwell setting forth "...the chronology of Mr. Kleinmann's layoff." (A-392-394, 649-652, 663-667, 674-676) According to testimony, Kleinmann was the only employee for which such "chronology" was prepared, and such "chronology" according to Cuite's testimony, was a document which was not prepared in the ordinary course of the State's business. (A-392-394, 649-652) Even claiming business

reorganization, attempted cost savings and workforce reduction, the State cannot use the cloak and pretext of legitimate business reason to violate a citizen or employee's civil rights. The Second Circuit has stated:

We merely hold that even during a legitimate reorganization or workforce reduction, an employer may not dismiss employees for unlawful discriminatory reasons; see Williams v. General Motors Corporation, 656 F.2d 120, 129-30 (5th Cir. Unit B, 1981), cert. denied, 455 U.S. 943, 102 S.Ct. 1439, 71 L.Ed. 2d 655 (1982), just as it may not fire unqualified employees who would not be fired as such but for their age.

Hagelthorn v. Kennecott Corporation, 710 F.2d 76 (2d Cir. 1983) at 81.

The State, by its own admission, conceded that Kleinmann was qualified. No valid, legitimate business reason has been established for Kleinmann's termination.

Reduction in force matters cannot be treated the same as termination or

replacement cases, and in such cases, plaintiffs are not held to the burden of proving replacement by a younger employee. Williams v. General Motors Corporation, 656 F.2d 120, 124 (5th Cir., Unit B, 1981); cert. denied, Kleinmann is entitled to the protection afforded to him by 29 U.S.C. Section 621(b), and should not be denied the federally guaranteed protection afforded by that statute. This Court specifically has held that any burden of proof requiring that several must suffer discrimination before one could assert a claim of discrimination is inconsistent with equal protection guarantees of the United States Constitution. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed. 2d 69 (1986). Kleinmann has met his burden and now must be afforded the federally

guaranteed protection of his civil rights. As clearly articulated in Montana v. First Federal Savings and Loan Association of Rochester, 869 F.2d 100 (2d Cir. 1989):

But where, as here, the plaintiff claims not that her employer used poor business judgment in discharging her but that her employer used the structural reorganization as a cover for discriminatory action, a federal court, to ensure that the business decision was not discriminatory, is not forbidden to look behind the employer's claim that it merely exercised a business decision in good faith.

Montana, 869 F.2d, at 106.

Continuing in Montana, the Court further interpreted this principle:

See also Meiri v. Dacon, 759 F.2d 989, 995 (2d Cir.1985) (courts must refrain from second-guessing decision making process, but must allow employees to show that employer acted in an illegitimate or arbitrary manner), cert. denied, 474 U.S.829, 106 S.Ct. 91, 88 L.Ed. 2d 74 (1985). To hold otherwise would effectively insulate an employer from the constraints of -

federal antidiscrimination law during any structural reorganization or reduction in force. Montana, 869 F.2d at 106

This Court consistently has protected plaintiff's rights in such cases and has mandated retrial in cases much less clear-cut than the instant action.

McDonald Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973). Judge Cholakis did not deal at all with issues of pretext or cover-up. However, in dealing with issue of retaliation the District Court, specifically held "This Court does not necessarily pass upon the correctness of the decisions made..." (A-29) That Court had a duty to ensure that the business decision was not discriminatory or retaliatory and that Court's decision failed to deal with these issues in the

manner prescribed by existing case law.

CONCLUSION

Pursuant to Rule 10.1(a) of the Rules of this Court, the Petition for a Writ of Certiorari should be granted or in the alternative, a Writ of Mandamus issue exercising the supervisory authority of this Court to insure protection of Kleinmann's rights.

Respectfully Submitted,

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JUN 25 1991

OFFICE OF THE CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATESOCTOBER TERM, 1991

GEORGE KLEINMANN,

Petitioner,

v.

MARIO CUOMO, AS GOVERNOR OF THE
STATE OF NEW YORK, THE STATE OF NEW
YORK AND ARTHUR Y. WEBB, AS
COMMISSIONER OF THE NEW YORK STATE
OFFICE OF MENTAL RETARDATION AND
DEVELOPMENTAL DISABILITIES,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI
APPENDIX - VOLUME 1

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INDEX

PAGE

VOLUME I

JUDGMENTS, ORDERS AND DECISIONS

Judgment, United States District
Court, Northern District of New
York, Kleinman [sic] v. Cuomo, et al.,
Case #85-CV-519, Dated June 13, 1989
. A-1

Decision, United States District
Court, Northern District of New York,
Kleinman [sic] v. Cuomo, et al.,
85-CV-519, June 13, 1989 A-2

Summary Order, United States Court of
Appeals, Second Circuit, Kleinmann v.
Cuomo, et al., #89-7695, filed
January 18, 1990 A-15

Findings of Fact, Conclusions of Law,
U.S. District Court, Kleinman (sic.) v.
Cuomo, et al., 85-CV-519, Dated June 20,
1990 A-18

Summary Order, U.S. Court of Appeals,
Second Circuit, Kleinmann v. Cuomo, et
al., 89-7695, filed January 3, 1991
. A-30

Order, U.S. Court of Appeals, Second
Circuit, Kleinmann v. Cuomo, et al.,
Filed February 27, 1991 A-36

Summary Order (First Page Only) U.S.
Court of Appeals, Second Circuit,
Kleinmann v. Cuomo, et al., #89-7695,
Stamped Filed January 3, 1991, received
in office of Plaintiff-Appellant counsel
March 11, 1991 A-38

ADMINISTRATIVE DECISIONS, DETERMINATIONS
AND OPINIONS

Budget Bulletin, B-1076, February 9,
1983, Determination, Michael Finnerty,
Statewide Personnel Reduction Policy,
Plaintiff's Trial Exhibit 9. . . . A-41

OMRDD, New York State Office of Mental
Retardation and Developmental
Disabilities, Decision, Statement of
Abolished Positions, March 2, 1983,
Trial Exhibit 51. A-61

VOLUME II

Notice of Abolished Positions, Form BD-
98, Decision of Division of the Budget,
effective May 4, 1983, Trial Exhibit
69 A-132

OMRDD, State of New York Office of Mental
Retardation and Developmental
Disabilities, Grievance Decision, April
4, 1983A-136

OMRDD, State of New York Office of Mental
Retardation and Developmental
Disabilities, Second Step Decision,
Grievance, April 20, 1983
.A-163

Arbitor's Opinion and Award, Governor's
Office of Employee Relations, In the
Matter of Arbitration between Public
Employees Federation, AFL-CIO and State
of New York, OMRDD, (George Kleinmann)
File #83-05-598, dated May 16, 1984
.A-176

OMRDD, State of New York Office of Mental
Retardation and Developmental
Disabilities, Grievance Decision, dated
May 18, 1983 A-201

Step 3 Decision, State of New York
Governor's Office of Employee Relations,
In the Matter of Public Employees
Federation, AFL-CIO, George Kleinmann,
Grievant, against State of New York,
OMRDD, OER File No. 83-05-366,
Dated June 10, 1983 A-214

OMRDD, State of New York Office of Mental
Retardation and Developmental
Disabilities, Grievance, Second Step
-Decision, June 30, 1983
. A-218

Step 3 Decision, State of New York
Governor's Office of Employee Relations,
In the Matter of Public Employees
Federation, AFL-CIO, George Kleinmann,
Grievant, against State of New York,
OMRDD, OER File No. 83-05-598, Dated
August 8, 1983 A-229

Equal Employment Opportunity Commission,
Arthur W. Stern, Deputy District
Director, Determination of Violation,
Charge No. 02840459, Dated _____,
Plaintiff's Exhibit 1A A-233

Letter of Violation, Equal Employment
Opportunity Commission, Arthur W. Stern,
Deputy District Director, Dated March 29,
1985 A-238

VOLUME III

New York State Department of Civil
Service, Determination of February, 1983,
Guidelines for the Administration of
Reductions in Force in New York State
Departments and Agencies A-247

Equal Opportunity Commission, Commission
Report, Letter dated May 19, 1986, Ann
Thacher Anderson, Senior Trial Attorney
. A-356

Equal Opportunity Commission, Freedom of
Information Act Determination pursuant to
5 U.S.C. Sec. 552 (b)(5), October 19,
1987 A-362

New York State Civil Service Law

Section 80A-365(1)

THE FOLLOWING ITEMS HAVE BEEN LODGED WITH
THE CLERK'S OFFICE

VOLUME IV

OTHER MATERIAL

Complaint, United States District Court,
Northern District of New York,

Kleinmann v. Cuomo, et al., dated

April 9, 1985A-366

Stipulation to Withdraw Appeal from
Active Consideration, United States Court
of Appeals, Second Circuit, Kleinmann v.

Cuomo, et al., So Ordered August 25,

1989, Docket No. 89-7695A-388

Notice of Reinstatement, United States
Court of Appeals, (Mistitled United
States District Court, Northern District
of New York), Second Circuit, Kleinmann
v. Cuomo, et al., filed October 1, 1990
. A-390

Rockwell Memo to Cuite, April 27, 1983,
Trial Exhibit, Plaintiff's Exhibit #152,
received in evidence 6/7/89A-393

CHARLES MICHAEL DEVANE, Trial Testimony
transcript pages 154-217
(Transcript Vol. II) A-395

GEORGE KLEINMANN, Trial Transcript,
Application for continuance to obtain
new Counsel (Denied on record),
transcript pages 2-13 (Transcript Vol.
III) A-499

PAGE

VOLUME V

LUCY KLEINMANN, Trial Transcript,
pages 13-25 (Transcript Vol III)
.A-518

Defense Motions at close of plaintiff's
case, transcript pages 25-47
(Transcript Vol. III) A-539

THOMAS CUIE, portions of Trial
Testimony, (Transcript Vol. III) . .A-575

VOLUME VI

THOMAS CUIE, portions of Trial Testimony
continued. A-642

Letter, Kleinmann to Rockwell, dated
April 7, 1983, claiming Computer
Programmer Job, Plaintiff's Trial Exhibit
#146 A-721

U.S. District Court, Northern District of
New York, Letter dated September 12, 1990
concerning Supplemental Index . . .A-724

Briefing Order, United States Court of
Appeals, Second Circuit, Kleinmann v.
Cuomo, et al., filed October 3, 1990
. A-735

United States Constitution,
Amendment 6A-737

United States Constitution,
Amendment 14 A-738

Federal Rules of Appellate Procedure,
Rule 35A-740

Federal Rules of Appellate Procedure,
Rule 40A-743

28 U.S.C. Section 455A-745

29 U.S.C. Section 621 et seq . . . A-753

29 U.S.C. Section 623A-756

29 U.S.C. Section 631A-759

42 U.S.C. Section 2000e, et seq . A-760

Federal Rules of Civil Procedure 52(a)
.A-771

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JUDGMENT IN A CIVIL CASE

GEORGE KLEINMAN

V.

MARIO CUOMO, as Governor of
the State of New York, et al

CASE NUMBER: 85-CV-519

 Jury Verdict. This action came
before the Court for a trial by jury.
The issues have been tried and the jury
has rendered its verdict.

 Decision by Court. This action came
to trial or hearing before the Court.
The issues have been tried or heard and a
decision has been rendered.

IT IS ORDERED AND ADJUDGED that
judgment be entered in favor of the
defendants as against the plaintiff.

I CERTIFY THIS IS A TRUE COPY
J.R. SCULLY, CLERK
U.S. DISTRICT COURT
By _____

Date: June 13, 1989
Clerk: Joseph R. Scully
(By) Robin Hinman, Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK
[Bench Decision]

GEORGE KLEINMAN,
Plaintiff

VS.

DECISION
85-CV-519

MARIO CUOMO, as Governor of the
State of New York, THE STATE OF NEW
YORK and ARTHUR Y. WEBB as
Commissioner of the New York State
Office of Mental Retardation
and Developmental Disabilities,

Defendants.

TRANSCRIPT OF PROCEEDINGS held in the
United States District Court, Northern
District of New York on Tuesday, June 13,
1989 at 10:30 A.M., before Hon. Con G.
Cholakis, Presiding.

APPEARANCES: FOR PLAINTIFF:
ROEMER & FEATHERSTONHAUGH
Attorneys at Law
99 Pine Street
Albany, New York 12207
BY: JAMES FEATHERSTONHAUGH, ESQ.
of Counsel

FOR DEFENDANTS:
HON. ROBERT ABRAMS, Attorney
General of the State of New York
NYS Department of Law
Justice Building
Empire State Plaza
Albany, New York
BY: ROBERT SIEGFRIED and JOHN S.
SHERMAN, Assistant Attorneys General, of
Counsel

[Court in session - 10:30 A.M.]

THE COURT: Please be seated. I call the case of Kleinman versus State of New York, et al. Mr. Featherstonhaugh, is Plaintiff ready?

MR. FEATHERSTONHAUGH: Plaintiff is ready.

THE COURT: Mr. Siegfried and Mr. Sherman?

MR. SIEGFRIED: Ready, Your Honor.

THE COURT: As I understand it, all the evidence was closed last -- was it Thursday?

MR. FEATHERSTONHAUGH: Yes, sir.

THE COURT: And the matter was adjourned to today for decision on the evidence produced before the Court. Correct, gentlemen?

MR. FEATHERSTONHAUGH: Correct.

THE COURT: Plaintiff is a long term employee of the State of New York and he sues the defendants alleging he was denied promotion and ultimately discharged because of his age. Also, that he was denied the benefits of the Rehabilitation Act of 1973 and, finally, that he was deprived of certain civil rights. Plaintiff's claim that he was deprived of certain civil rights was dismissed by the Court before commencement of the trial. Plaintiff's claim that he was deprived of the benefits of the Rehabilitation Act of 1973 was dismissed following the conclusion of the Plaintiff 's case, The sole claim which remains to be decided is the ADEA claim, that is that he was denied promotion and was ultimately laid off because of his age. Plaintiff commenced work for the State of

New York on or about June 20th, 1966 as a Grade 14 employee. Sometime in 1970 the plaintiff filled a position which carried a Grade 18 rating. During the balance of plaintiff's employment until he was laid off on May 4, 1983, he remained in Grade 18 positions. Plaintiff alleges that commencing sometime in 1978 he filed many applications for promotions to positions carrying Grades 23, 25 and 27 levels. He alleges that he was not considered for any of the positions except for one. He never received any promotion beyond a Grade 18 position. While the plaintiff did not receive any of the promotions for which he applied, he could not testify to any direct acts of discrimination because of his age. It was his testimony the only possible explanation for being passed over was because of his age. He could not tell us what positions he actually

applied for except for a few. He could not tell us whether the positions were actually filled and, if so, by whom. It is possible many of these positions were never actually filled and, if they were, it is equally possible they were filled by people who, like plaintiff, were in the protected class.

The Court must state that it accepts the defendant's position that the failure-to-promote claim cannot give rise to any remedy, since all applications for promotion were filed more than 300 days before the plaintiff filed his complaint with the EEOC. However, the Court accepts the proffered evidence in order to determine whether the plaintiff has proven discriminatory intent on the part of the defendants.

Plaintiff also alleges that the section in which he worked within the Office of

Mental Retardation and Developmental Disabilities was located for many years on Holland Avenue. Sometime in 1982 a decision was made to remove his section from Holland Avenue to the Westgate Shopping Center area. Plaintiff objected to being moved and, as an accommodation, he was moved into another man's job so he could remain on Holland Avenue. However, on or about January 3, 1983, plaintiff was notified that he would have to move to Westgate. The very next day he filed a non-contract grievance and the day following that he went on sick leave and personal leave, from which he did not return until April 4, 1983. On March 11th, 1983, during the time that the plaintiff was on leave, a letter was mailed stating that he would be laid off from his employment effective April 7, 1983. On March 18th, 1983 a hearing was

held on plaintiff's non-contract grievance and resulted in an unfavorable decision. Sometime thereafter, plaintiff filed a contract grievance alleging that he had been retaliated against because of prior complaints. The effective date of all layoffs was extended from April 7, 1983 to May 4, 1983 when plaintiff's employment was actually terminated. Thereafter on June 6th, 1983 plaintiff reentered state employment with the Office of General Services as an Assistant Purchasing Agent, a Grade 14 position. He has remained there to this very day.

In order for the plaintiff to be successful he must prove the following: One, during the time in question he was in the protected age group; two, he was qualified for the job which he held; three, he was discharged and four,

plaintiff's age was a determining factor in his discharge.

The parties agree that the Plaintiff, having been born on December 26th, 1925, was at all times pertinent to this lawsuit in the protected class. They also agree that he was qualified for the job he held and that he was discharged. Therefore, the first three items which the plaintiff must prove have been conceded to exist and the Court so finds.

It is the fourth and final element which the plaintiff must approve which is an issue. That is, that the plaintiff's age was a determining factor in his discharge. This element can, of course, be proven through direct evidence of discriminatory intent on the part of the defendants. The plaintiff has not

presented any direct proof of this element and the Court so finds. The element can also be proven by indirect proof. In order for the plaintiff to succeed by this method, he must have proven that the discharge occurred in circumstances which give rise to the inference of age discrimination. If the plaintiff does prove this element, the defendants are then given an opportunity to articulate some legitimate non-discriminatory reason for the plaintiff's discharge. If the defendants are successful in showing a legitimate non-discriminatory reason for plaintiff's discharge, the plaintiff must then prove, by a preponderance of the evidence, that the legitimate reasons offered by the defendants were not the true reasons for this discharge, but were a pretext for the discrimination to which he was

subjected. The plaintiff set forth a scenario which he claims proves he was the subject of age discrimination. Included within this scenario is the number of jobs that he applied for and was unsuccessful in obtaining, the pressure he was under from his former supervisor, Mr. Radzyninski; the failure to prevent his transfer from Holland Avenue to Westgate; and, ultimately, his discharge from his position when there were many younger persons in related jobs that plaintiff was able to do who were not laid off. The Court does not find the scenario described by the plaintiff necessarily gives rise to an inference of age discrimination by the defendants. However, the Court will give the plaintiff the benefit of each of his allegations and look into the evidence produced by the defendants. The

defendants allege, and the Court so finds, that the Division of the Budget determined that budget cuts were necessary in order for the State to operate within its budget; that each department was asked to cut back its expenditures in order to come within a fixed total budget; that each department determined what cuts could be made in order to realize the requested savings and that the recommended cuts were transmitted to the Division of the Budget where the final decisions were made and layoff notices prepared and mailed. The Court finds that the OMRDD had two positions in the Administrative Assistant category, that being the position occupied by the plaintiff, located in Albany and that both positions were abolished in an attempt to realize the requested monetary savings and neither

position was thereafter refilled and that the State followed state law concerning the layoffs. In order for the State to have kept the plaintiff in his position while at the same time terminating a younger employee who was holding a related job which the plaintiff was qualified to perform but which job was not being abolished, would not only have violated State law but would have given the plaintiff more rights than the ADA gives those in the protected classes. In this Court's judgment, the defendants have established a legitimate non-discriminatory reason for the plaintiff's discharge which the plaintiff has not proven was a pretext for the discrimination. The Court finds the defendants are entitled to a judgment dismissing plaintiff's claim in its entirety and directs the Clerk to prepare

and enter such a judgment.

Anything further?

MR. FEATHERSTONHAUGH: Nothing, Your Honor.

MR. SIEGFRIED: Thank you, Your Honor.

THE COURT: Court is adjourned.

[Court adjourned at 10:40 A.M.]

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

MANDATE

NDNY
85-CV-519
CHOLAKIS

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 18th day of January one thousand nine hundred and ninety.

Present: (Filed Jan 18,
1990)

Hon. J. Edward Lumbard,
Hon. Wilfred Feinberg,
Hon. J. Daniel Mahoney, Circuit
Judges,

GEORGE KLEINMANN,
Plaintiff-Appellant,

v

89-CV-7695

MARIO CUOMO, As Governor of the
State of New York, THE STATE OF NEW YORK,
and ARTHUR Y. WEBB, as Commissioner of
the New York State Office of Mental
Retardation and Developmental
Disabilities,

Defendants-Appellees.

The above captioned appeal having
been heard by the panel, it is hereby
ordered that this case be remanded to the

United States District Court for the Northern District of New York (Con. G. Cholakis, J.) for findings of fact and conclusions of law as to plaintiff-appellant's cause of action alleging retaliation, the crux of which (according to appellant's reply brief in this court, at p. 5) is alleged retaliation in employment by virtue of the refusal of the New York State Office of Mental Retardation and Developmental Disabilities (OMRDD) to allow plaintiff-appellant to accept on April 7, 1983 a position that OMRDD allegedly offered him on March 18, 1983.

It is further ordered that the Court shall retain jurisdiction pending such findings. The parties shall promptly notify this Court when such findings are entered.

N.B. This summary order will not be
published in the Federal Reporter and
should not be cited or otherwise
relied upon in unrelated cases before
this or any other court.

J. EDWARD LUMBARD

WIFRED FEINBERG

J. DANIEL MAHONEY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

GEORGE KLEINMAN,

Plaintiff,

-against-

85-CV-519

MARIO CUOMO, a Governor of the
State of New York and
ARTHUR Y. WEBB as Commissioner
of the New York State Office of
Mental Retardation and Developmental
Disabilities,

Defendants.

APPEARANCES:

GLEASON, DUNN, WALSH & O'SHEA, ESQS.
Attorneys for Plaintiff
11 North Pearl Street
Albany, New York 12207
OF COUNSEL:
Ronald G. Dunn, Esq.

ROBERT ABRAMS, ATTORNEY GENERAL
STATE OF NEW YORK
Department of Law
Capitol
Albany, New York 12224
OF COUNSEL:
John Q. Driscoll, Esq.
Assistant Attorney General

CON G. CHOLAKIS, D.J.

MEMORANDUM

The above entitled matter having been tried by the court and a decision having been rendered on June 13, 1989, and the plaintiff having appealed the court's decision and the United States Court of Appeals for the Second Circuit having remanded the case on January 18, 1990 for the trial court to make findings of fact and conclusions of law as to plaintiff's cause of action alleging retaliatory firing, now, therefore, the court finds as follows:

[Stamped "Exhibit A"]

FINDINGS OF FACT

1) Plaintiff George Kleinman was born on December 26, 1925 and was therefore, at all times pertinent to this action, within the protected class set forth in the Age Discrimination in Employment Act.

2) Defendant Office of Mental Retardation and Developmental Disabilities (OMRDD) is an agency of the State of New York and an Employer as defined in the Age Discrimination in Employment Act.

3) On and before January 3, 1983 plaintiff was an employee of the OMRDD and was assigned to OMRDD's central office at 44 Holland Avenue, Albany, N.Y., where he was serving as administrative assistant to the Deputy Commissioner for Quality Assurance.

4) On January 3, 1983, plaintiff

received a memorandum from Deputy Commissioner Thomas Cuite that he was being reassigned from the Central Office to the Bureau of Certification Control at 30 Russell Road, Albany, New York and that the transfer was to be effective immediately.

5) On January 4, 1983, plaintiff went on sick leave claiming the prospect of being reassigned to the new location where he would be under a former supervisor caused a recurrence and aggravation of medical and psychological problems which he had experienced several years before.

6) On January 4, 1983, plaintiff went to the office of McKinley Jones, OMRDD affirmative action officer, and told him he suspected that his age was a substantial factor in his treatment by OMRDD and asked him to investigate the

matter. However, he did not file a formal complaint of discrimination.

7) On January 4, 1983, plaintiff also filed a non-contract grievance in which he alleged a violation of a prior agreement which allowed him to remain at 44 Holland Avenue when his former unit moved to 30 Russell Road. This grievance did not allege age discrimination but, rather, complained of the re-assignment, on one day's notice, to a previous supervisor with whom he had an extremely poor experience and to a location which was a hardship for him.

8) By memorandum dated January 27, 1983, plaintiff was notified that he was being reassigned to a different supervisor, Mr. Montoro.

9) By letter dated March 11, 1983 from OMRDD Commissioner Zygmund L. Slezak, plaintiff was notified that due to

serious fiscal problems facing the State, he would be laid off from his position effective April 7, 1983.

10) Determinations as to the specific positions in OMRDD to be abolished as a result of the State's fiscal problems, pursuant to a directive from the Division of the Budget, were made during the last week in January and the first week in February, 1983. Plaintiff's position was among those listed for abolition at that time.

11) Plaintiff's line item number and title, #20055 Administrative Assistant, G-18, were included in the list of positions to be abolished in OMRDD in a document dated March 2, 1983 and transmitted to the Director of the Budget. Plaintiff's position was determined to be unneeded in view of fiscal constraints.

12) On February 26, 1983, plaintiff appealed his non-contract grievance to the second step. The appeal was received at OMRDD on March 2, 1983. In his appeal plaintiff added further allegations of contractual violations on the matter of his reassignment, including a violation of Article 36 of the Agreement.

13) A second-step hearing was held on March 18, 1983, which related to both the non-contract and contract grievances. In the course of the hearing plaintiff enlarged his grievances to allege that his layoff was motivated by age discrimination.

14) Plaintiff filed a formal charge of age discrimination against OMRDD with the Equal Employment Opportunities Commission on December 20, 1983.

15) —The decision to abolish plaintiff's position occurred before plaintiff filed

a charge of age discrimination, therefore, the decision to abolish plaintiff's position was not in retaliation for such charge.

16) At the time plaintiff's position was abolished, there were no lower level positions in his series, therefore, plaintiff had neither "bumping" nor retreat rights in OMRDD.

17) On or just prior to March 18, 1983, Ray Rockwell, OMRDD Assistant Director of Personnel, learned that a Computer Programmer position, Grade 14, in another agency, currently occupied, was being transferred to OMRDD effective April 1, 1983.

18) Because plaintiff had previously served as a Computer Programmer, he would have a right under Civil Service Law Sec. 80 to retreat into that position upon his layoff and to displace the less senior

22) Not having a decision from plaintiff that he intended to claim the retreat, on March 23, 19083, Mr. Rockwell notified plaintiff that he was considered to have declined the offer.

23) Two weeks later on April 7, 1983, plaintiff wrote to Mr. Rockwell attempting to claim the Computer Programmer position. However, by letter dated April 12, 1983, Mr. Rockwell informed plaintiff that his attempt to claim the retreat option was untimely.

24) The plaintiff's failure to obtain the retreat option was due to his own indecision and was not as an act of retaliation by officials at OMRDD.

25) Plaintiff was laid off from his position on May 4, 1983. His name was placed on a preferred list, pursuant to Civil Service Law Sec. 81, for eventual reinstatement to a vacancy in a

comparable position in State government. He was reinstated to a position in the Office of General Services on June 6, 1983.

26) Determinations as to which positions are "comparable" for the purpose of reinstatement from a preferred list are made by the Department of Civil Service. Placement of preferred list eligibles is administered by the Department of Civil Service.

27) The position of M.R. Program Planner in OMRDD, held by a provisional employee, Bonnie Raines, was not declared comparable to plaintiff's abolished position by the Department of Civil Service for the purposes of reinstatement from the preferred list.

28) The defendants did not retaliate against plaintiff in the matter of his reinstatement from a preferred list.

CONCLUSIONS OF LAW

FIRST: The decision to abolish plaintiff's position was a legitimate business decision, based upon severe fiscal constraints and a determination that the elimination of that position would have no significant programmatic impact; it was not taken in retaliation for any complaint of age discrimination by plaintiff.

SECOND: Plaintiff's failure to obtain a proffered retreat option was the result of his own inaction. He was not denied a retreat or "bumping" option as a retaliation for any claim of discrimination.

THIRD: Plaintiff's failure to be reinstated to a claimed position in OMRDD was the result of a determination of non-comparability by the Department of Civil

Service, the agency charged with such determinations, and was not the result of any retaliatory intent by defendants.

FOURTH: This court does not necessarily pass upon the correctness of the decisions made by the state agencies but merely determines whether their actions were retaliatory in nature.

CON. G. CHOLAKIS, JUDGE
UNITED STATES DISTRICT COURT

DATED: June 20, 1990
Albany, New York

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

85-CV-519
N.D.N.Y.
Judge Cholakis

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City and County of New York, on the 3rd day of January one thousand nine hundred and ninety-one.

PRESENT:

HONORABLE J. EDWARD LUMBARD
HONORABLE WILFRED FEINBERG
HONORABLE J. DANIEL MAHONEY

Circuit Judges

GEORGE KLEINMANN,

Plaintiff-Appellant,

-against-

89-CV-7695

MARIO CUOMO, as Governor of the
State of New York, et al.,

Defendants, Appellees.

Appeal from the United States
District Court for the Northern District
of New York. [stamped "Exhibit B"]

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued in part and submitted in part.

UPON CONSIDERATION WHEREOF, it is here ordered, adjudged and decreed that the judgment of said district court is affirmed.

1. George Kleinmann appeals from a judgment of the United States District Court for the Northern District of New York, Con. G. Cholakis, J., after a bench trial, dismissing his claims under the Age Discrimination in Employment Act (ADA), 29 U.S.C. Sec. 621 et seq.

Appellant claimed that he was selected for layoff from the New York State Office of Mental Retardation and Developmental Disabilities (OMRDD) because of his age and that he was denied displacement and

recall rights in retaliation for his discrimination claim. The district court's original decision, issued from the bench on June 13, 1989, dismissed appellant's entire suit, but discussed only the discriminatory layoff claim. By order dated January 18, 1990, we retained jurisdiction of this appeal while remanding for findings of fact and conclusions of law on the retaliation claim. The district court thereafter issued its findings and conclusions by memorandum dated June 20, 1990.

Subsequently, supplemental briefs were filed in this court and no further argument was required.

2. Appellant argues that in dismissing his discrimination claim the district court erroneously relied on the finding that appellant's position was abolished, even though the job was not mentioned in

a document in evidence purportedly listing abolished positions. It was not error for the district court to rely on the ample other evidence in the record showing that appellant's position was abolished. Appellant also argues that the district court erroneously required him to prove that he was replaced by a younger employee, but the record reveals that the district court properly considered whether all the circumstances showed that age was a factor in appellant's discharge.

3. Appellant has stated to this court that the crux or "centerpiece" of his retaliation claim is the OMRDD's refusal to allow him to accept on April 7, 1983 a position that had been offered to him on March 18, 1983. The district court found, with ample support in the record, that appellant was denied the position

because he failed to decisively accept it until after the offer was withdrawn. There was also ample evidence showing legitimate reasons for OMRDD to set an early acceptance deadline.

4. Appellant also contends that the district court erroneously held that his employer's compliance with state civil service law insulated it from liability under the ADA. We do not find this contention to be supported by a fair reading of the district court's two decisions.

5. We have considered all of appellant's arguments, we affirm the judgment of the district court.

J. EDWARD LUMBARD

WILFRED FEINBERG

J. DANIEL MAHONEY
Circuit Judges

N.B.: This summary order will not be
published in the Federal Reporter
and should not be cited or otherwise
relied upon in unrelated cases before
this or any other court.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

(Filed Feb 27, 1991)

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 27th day of February, one thousand nine hundred and ninety-one.

GEORGE KLEINMANN,

Plaintiff-Appellant,

v.

DOCKET NUMBER
89-CV-7695

MARIO CUOMO, as Governor of the
State of New York, et. al.,

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellant George Kleinmann

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing en banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

By: Chief Deputy Clerk

(stamped "Exhibit C")

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

85-CV-519
N.D.N.Y.
Judge Cholakis

At a stated Term of the United
States Court of Appeals for the Second
Circuit, held at the United States
Courthouse in the City and County of New
York, on the 3rd day of January, one
thousand nine hundred and ninety-one.

PRESENT:

HONORABLE J. EDWARD LUMBARD
HONORABLE WILFRED FEINBERG
HONORABLE J. DANIEL MAHONEY

Circuit Judges Filed Jan 8, 1991

GEORGE KLEINMANN,

Plaintiff-Appellant,

-against-

89-CV-7695

MARIO CUOMO, as Governor of the
State of New York, et al.,

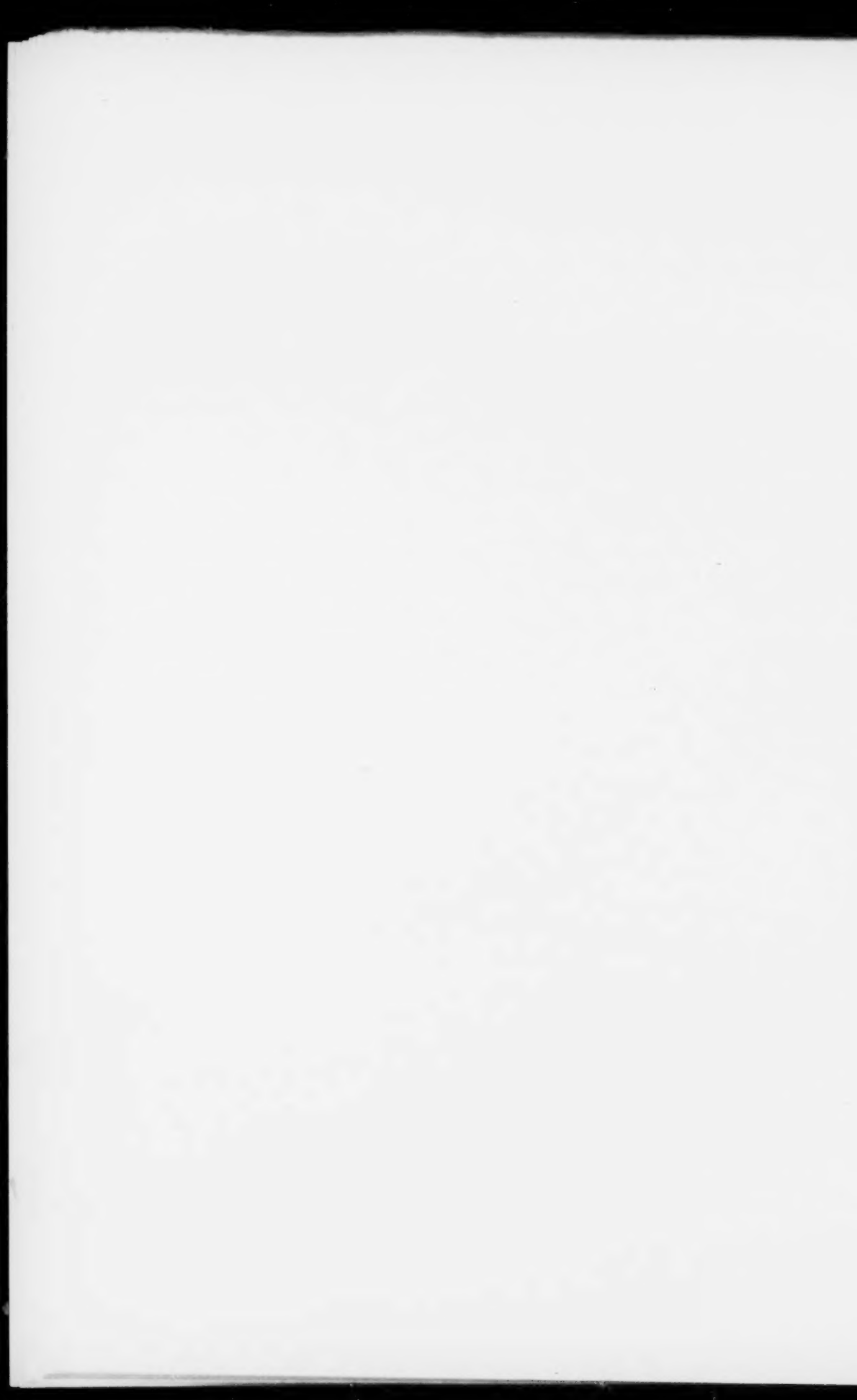
Defendants-Appellees.

Appeal from the United States
District Court for the Northern District
of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued in part and submitted in part.

UPON CONSIDERATION WHEREOF, it is hereby ordered, adjudged and decreed that the judgment of said district court is AFFIRMED.

(stamped "Exhibit D")



PLAINTIFF'S
EXHIBIT

A-40

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
DIVISION OF THE BUDGET
STATE CAPITOL
ALBANY, 12224

MICHAEL FINNERTY
DIRECTOR OF THE BUDGET
(Letterhead)

BUDGET BULLETIN B-1076 FEBRUARY 9,
1983

TO: ALL DEPARTMENT AND AGENCY HEADS
FROM: Michael Finnerty
SUBJECT: Statewide Personnel Reduction
Policy

As you know, the Governor announced in his Annual Budget Message a program of workforce reductions based upon employee layoffs, employee attrition, incentives to encourage eligible workers to retire, and a program of voluntary furloughs as an alternative to terminating additional State employees. This bulletin covers the layoff and attrition components of the personnel reduction policy. The retirement incentive and voluntary

furlough components of this policy are not covered in this bulletin and will be described in subsequent bulletins.

There will be no layoffs among correction officers, parole officers, sworn State Police Officers and direct care personnel in the Division for Youth. Positions that provide direct care to our mentally and physically dependent populations will be subject to layoffs at no more than half the rate of others and will not be subject to the attrition policy.

It is estimated that the State workforce will incur a net reduction of over 14,000 funded positions by the end of the 1983-84 State fiscal year. You have been advised of the number of positions which were projected to be abolished in your agency. You have also been advised of the number of positions

which are expected to remain vacant when a current member of your staff leaves your agency. This number provides for refilling two of every three jobs that become vacant through normal attrition. These figures are based upon the total appropriation savings which are required to balance the State Financial Plan.

Recommended appropriations contained in the Executive Budget reflect the reduced staffing levels for all agencies. These appropriations do not reflect savings from the retirement incentive and voluntary furlough components. Your plan must reflect actions deemed necessary to operate effectively within the reduced recommended appropriation level. The reduction in appropriations as reflected in the Executive Budget is controlling, not the number of positions to be abolished. Therefore, the number of

positions to be abolished will increase if predominantly lower paid positions are abolished; if higher paid positions are abolished a decreased number of positions will be involved.

RESPONSIBILITIES OF DEPARTMENT AND AGENCY HEADS

It is your responsibility, working closely with the Division of the Budget, the Department of Civil Service and the Governor's Office of Employee Relations, to develop an implementation plan prior to March 1, 1983. In your 1983-84 budget, funding for positions to be terminated was provided for only three pay periods to offset the cost of the lag payroll, three weeks notice, and the lump sum payment of accumulated leave credits. Therefore, it is very important that all notifications to employees to be terminated be delivered in strict

accordance with instructions that will be forthcoming from the Department of Civil Service. Instructions will also be provided by the Department of Civil Service on other matters relating to employee layoffs including preferred lists, rights of terminated employees and retraining, where necessary.

Each of you should designate a deputy to coordinate the required personnel actions which will result from your plan. Forward your designation directly to me not later than Thursday, February 10.

The appropriation reductions related to the Statewide Personnel Reduction Policy were applied in an across-the-board fashion; however, it was not our intention to mandate equal reductions in all programs. This was only an interim solution until your implementation plan

was formulated and approved. Accordingly, we have requested authorization from the Legislature to exceed the interchange limitations imposed by the State Finance Law; however, in prior years requests of this nature have been denied. Therefore, it is extremely important that you furnish us with as much general information about your plan as is possible prior to February 25. This will enable us to incorporate major changes, such as program eliminations, in the thirty-day amendment to the Budget. This will also provide the Legislative Fiscal committees with information they need in order to finish their action on the budget before April 1. Work on final details of the plan can still continue until March 1.

As you formulate your implementation plan over the next three weeks, it is

imperative that you work closely with your budget examiner(s). My staff has been directed to work closely with you and your staff in the development of the implementation plans. They are immediately available and will meet with you and your staff at your convenience to promote an orderly process in an expeditious manner. It is important that you meet the deadline for achieving an agreed-upon plan before March 1, 1983 to ensure the timely notification to affected employees and to ensure the necessary savings in the 1983-84 financial plan.

The Governor and I realize that there are no easy choices in this process. We must depend upon you and your staff to effectively manage your agency with less staff and fewer resources with little or no diminution of

services to the taxpayers of our State. Therefore, before formulating your implementation plan you should prioritize the activities your agency performs with the idea of outright elimination of low priority or marginally effective programs in order to allow more effective performance in higher priority programs. For example, it may be feasible to consolidate certain bureaus or offices which have overlapping functions. Additionally, if you are aware of any function which your agency is currently performing which is also presently being performed elsewhere or could be performed elsewhere but more effectively, talk to your budget examiner about it.

In formulating your plan follow these guidelines:

- Only permanent savings are permitted. A recommendation of

deferred equipment purchasing or other NPS deferral as a substitute for permanent reductions in staff or program cannot be accepted.

- One-time savings of any variety cannot be substituted for permanent savings.
- Interchanges between PS and NPS or the reverse within a program may be acceptable but only if it furthers the goal of permanent savings.
- Personnel target adjustments will be authorized where approved plans include such interchanges.
- Interchanges between programs or the outright elimination of a program and consequent transfer of that program's resources to other higher priority programs may be acceptable if it furthers the goal of permanent savings while retaining performance

and efficiency.

- Personnel who leave State service under the Retirement Incentive option cannot be considered as a personnel reduction against the layoff allocation or the attrition allocation.

The savings from these additional reductions have been separately factored into the State Financial Plan. When procedures are published on this option, instructions on procedures for assessing the savings against each department and agency fiscal plan will be included.

- Transfers to non-State supported accounts, such as federal funds or other funds should be considered in your implementation plan if sufficient appropriation authority has been recommended in the

the Executive Budget. Proposals of this type can be considered to lessen the impact of General Fund reductions. These proposals must provide permanent savings to the General Fund.

Attached to this bulletin are formats and instructions for preparation of the department or agency implementation plan. Once again I emphasize that the final plan is due March 1, 1983.

RESPONSIBILITIES OF THE DIVISION OF THE BUDGET

It will be the responsibility of the staff of the Division of the Budget to work closely with State departments and agencies beginning immediately and throughout the plan formulation phase to ensure that on or before March 1, 1983 an

acceptable plan is presented to the Director of the Budget for approval. Staff of the Division will meet with department and agency staff at the earliest opportunity to produce the best quality plan in final form prior to March 1, 1983.

RESPONSIBILITIES OF THE GOVERNOR'S OFFICE
OF EMPLOYEE RELATIONS AND THE DEPARTMENT
OF CIVIL SERVICE

It will be the responsibility of the Governor's Office of Employee Relations and the Department of Civil Service to be immediately available throughout the formulation phase of this process to assist State departments and agencies in developing solutions to personnel problems which will arise as a result of these deliberations.

Attachments

INSTRUCTIONS FOR
AGENCY IMPLEMENTATION PLAN FOR
STATEWIDE PERSONNEL REDUCTION

Agency Overview

Outline in narrative form the actions that will be taken by the agency to implement the plan. The agency overview will be supported by specific plans for each program. The plan must reflect any programmatic increases or decreases from the appropriations and/or personnel levels that were recommended in the Executive Budget; however, the overall agency plan cannot exceed the total of General Fund appropriations recommended.

It is expected that agency plans will be formulated in a way that minimizes disruption of services. The agency plan must identify the impact on services to the public. Be very specific

regarding any service which is proposed for elimination or curtailment.

INSTRUCTIONS

1. FISCAL REQUIREMENTS

For each program within the General Fund, a form must be completed. This form will consist of recommended appropriations, Column A, as they appear in the Executive Budget. Column B should reflect the agency's realignment of appropriations according to the priorities established within the implementation plan. The Change column reflects the difference between Columns A and B. In addition to submitting a form for each agency program, an agency summary form must also be submitted. The summary form will compare the total agency recommendation to the total implementation plan. It must be noted

that the total of the implementation plan must be equal to or less than the agency total for the General Fund contained in the Executive Budget.

2. PERSONNEL PLAN:

This form will summarize personnel changes, for those positions funded from Personal Service Regular appropriations only, by program. Each agency program will show the number of Executive Budget recommended positions listed in Column A, revised personnel total listed in Column B and the change specified in the last column. The plan must include a complete explanation concerning funded positions which are presently vacant and will be abolished thereby offsetting a layoff or an attrition. Agency totals in Column A must equal the number of funded positions contained in the Executive Budget. Column B should reflect the agency's

implementation plan which may differ from totals shown in the Executive Budget due to the use of actual salaries of those positions to be laid off rather than the agency's average annual salary, or due to interchanges to/from other programs or expenditure classifications.

3. ABOLISHED POSITIONS (funded in 1982-83 Budget):

A complete list of the abolished funded positions will be included in the agency plan. This list must show the program or subprogram as indicated in the Audit and Control payroll file, the item number (if possible), the title of the position, next year's salary for the position and whether it is presently filled or vacant. A separate list must be prepared for each Audit and Control payroll code.

1983-84
FISCAL AND PERSONNEL OPERATING PLAN
GENERAL FUND

Agency_____ Program_____

PART 1. FISCAL REQUIREMENTS

| (A) 1983-84 Executive Budget Recommended Appropriation | (B) 1983-84 Agency Implementation Plan | (C) Change |
|---|---|------------|
|---|---|------------|

Personal Svc. Reg
Temp. Svc.
Holiday Overtime
Additional Comp.

Total Pers. Svc.

Supplies & Mat.
Travel
Contractual Svc.
Equipment
Fringe Benefits

Total Pers. Svc.

Maintenance Undis.

Total Appropriations

1/ In those cases where the appropriations bills show only total personal service and nonpersonal service use these lines.

2/ Applies to General Fund reimbursable accounts or closed pension systems only.

3/ List each Maintenance Undistributed Appropriation separately.

1983-84
FISCAL AND PERSONNEL OPERATING PLAN
GENERAL FUND)

Agency _____

2. PERSONNEL PLAN (For positions funded from
Personal Service-Regular)

| (A) | (B) | (C) |
|------------------|------------|--------|
| 1983-84 | | |
| Executive Budget | 1983-84 | Change |
| Recommended | Agency | |
| Funded Positions | Implement. | Plan |

Name of Programs

Total of Positions

1983-84
FISCAL AND PERSONNEL OPERATING PLAN
GENERAL FUND

Agency_____A&C Payroll Code_____

PART 3. ABOLISHED POSITIONS (WHICH WERE FUNDED
IN 1982 83 BUDGET

| Name of Program | Item Number | Title | Salary | Vacant or Filled |
|--------------------|----------------|-------|--------|------------------------|
|--------------------|----------------|-------|--------|------------------------|

PLAINTIFF'S EXHIBIT
51

A-60

STATE OF NEW YORK
OFFICE OF MENTAL RETARDATION AND DEVELOPMENTAL
DISABILITIES
(Letterhead)

The Honorable Michael Finnerty
Director
Division of Budget
State Capitol
Albany, NY 12224

Attn: David Googins

Dear Mr. Finnerty:

Attached is the Office of Mental Retardation and Developmental Disabilities' plan which was developed in response to Budget Bulletin B-1076.

The plan consists of:

1. Systemwide Fiscal Requirement Table.
2. Program Specific Fiscal Requirement Tables.
3. Program Specific Personnel Plans/Targets.
4. Program Specific Listings of Positions to be Abolished April 1, 1983.

The following is a summary of the plan:

Fiscal Requirements

It is anticipated that the full \$632,911,000 in State Purposes Funds recommended will be expended in 1983-84.

Page 2

| <u>Program</u> | <u>Recommendation</u> | <u>OMRDD Plan</u> |
|-------------------------|-----------------------|--------------------|
| Executive Management | \$12,988,000 | 13,015,400 |
| Quality Assurance | 4,354,000 | 4,311,100 |
| Revenue & Reimbursement | 6,125,000 | 6,097,800 |
| Research | 8,416,000 | 8,489,400 |
| Court Ordered Programs | 971,000 | 971,000 |
| Prev&Care Institutional | 478,635,000 | 478,561,600 |
| Prev&Care Community | 121,442,000 | 121,464,700 |
| GRAND TOTAL | <u>632,911,000</u> | <u>632,911,000</u> |

Change *

+ 27,400
 - 42,900
 - 27,200
 - 73,400
 0
 - 73,400
 + 42,700

0

* 5% interchangeability.

Personnel Plan

| <u>Program</u> | 3/31/84 Staff Recommendation | 3/31/84 Staff OMRDD Plan | Change |
|---------------------------|---------------------------------|-----------------------------|-------------|
| Executive Management | 297 | 309 | +12* |
| Quality Assurance | 114 | 114 | 0 |
| Revenue and Reimbursement | 263 | 263 | 0 |
| Research | 220 | 220 | 0 |
| Court Ordered | 31 | 31 | 0 |
| Residential | 20,931 | 20,931 | 0 |
| Community | 4,769 | 4,769 | 0 |
| Grand Total | <u>26,625</u> | <u>26,637</u> | <u>+12*</u> |

*Conversion of Contractual Services OTPS to Funded PS items.

LayoffsOMRDD Plan

| <u>Program</u> | <u>PhaseI</u> 4/1/83 | <u>PhaseII</u> | <u>Total</u> |
|---------------------------|-------------------------|----------------|--------------|
| Executive Management | 23 | 28 | 51 |
| Quality Assurance | 6 | 25 | 31 |
| Revenue and Reimbursement | 6 | 9 | 15 |
| Research | 22 | 3 | 25 |
| Court Ordered | 0 | 0 | 0 |
| Residential | 665 | 925 | 1590 |
| Community | 309 | 251 | 560 |
| Y.O.P. | 11 | 0 | 11 |
| Grand Total | <u>1042</u> | <u>1241</u> | <u>2283</u> |

1983-84
FISCAL AND PERSONNEL OPERATING PLAN
GENERAL FUND

Agency OMRDD Program ALL
PART 1. FISCAL REQUIREMENTS

| | (A) 1983-84 Executive Budget Recommended Approps. | (B) 1983-84 Agency Implementation Plan | (C) Change |
|-------------|--|--|---------------|
| Personal | | | |
| Svc. Reg. | 490,273,000 | 490,320,000 | +47,000 |
| Temp.Svc. | 1,411,000 | 1,364,000 | -47,000 |
| Holiday | | | |
| Overtime | 7,975,000 | 7,975,000 | 0 |
| Additional | | | |
| Comp. | 1,600,000 | 1,600,000 | 0 |
| Total | | | |
| Pers. Svc. | 501,259,000 | 501,259,000 | 0 |
| Supplies | | | |
| & Mat. | 48,800,000 | 48,800,000 | 0 |
| Travel | 4,219,000 | 4,219,000 | 0 |
| Contractual | | | |
| Svc. | 38,301,000 | 38,301,000 | 0 |
| Equipment | 3,390,000 | 3,390,000 | 0 |
| Fringe | | | |
| Benefits 2/ | | | |
| Total | | | |
| Non Pers. | | | |
| Svc. 1/ | 94,710,000 | 94,710,000 | 0 |
| Maintenance | | | |
| Undist. 3/ | 36,942,000 | 36,942,000 | 0 |
| Total | | | |
| Approps. | 632,911,000 | 632,911,000 | 0 |

1/ In those cases where the appropriations bills show only total personal service and nonpersonal service use these lines.

2/ Applies to General Fund reimbursable accounts or closed pension systems only.

3/ List each Maintenance Undistributed Appropriation separately.

1983-84
FISCAL AND PERSONNEL OPERATING PLAN
GENERAL FUND

Agency-OMRDD Program-Executive Management

PART 1. FISCAL REQUIREMENTS

| | (A) 1983-84 Executive Budget Recommended Approps. | (B) 1983-84 Agency Implement. Plan | (C) Change |
|-----------------|--|--|---------------|
| Personal | | | |
| Svc. Reg. | 9,543,000 | 9,570,400 | +27,400 |
| Temp. Svc. | | | |
| Holiday | | | |
| Overtime | 41,000 | 41,000 | 0 |
| Additional | | | |
| Comp. | 41,000 | 41,000 | 0 |
| Total /1 | <hr/> | <hr/> | <hr/> |
| Pers. Svc. | 9,625,000 | 9,652,000 | 0 |
| Supplies | <hr/> | <hr/> | <hr/> |
| & Mat | 158,000 | 138,000 | 0 |
| Travel | 222,000 | 222,000 | 0 |
| Contractual | | | |
| Svc. | 2,940,000 | 2,940,000 | 0 |
| Equipment/2 | 63,000 | 63,000 | 0 |
| Fringe Benefits | | | |
| Total/1 | <hr/> | <hr/> | <hr/> |
| NonPers | 3,3,000 | 3,363,000 | 0 |
| Maintenance | | | |
| Undist. 3/ | <hr/> | <hr/> | <hr/> |
| Total | | | |
| Approps. | 12,988,000 | 13,015,400 | +27,400* |

1/ In those cases where the appropriations bills show only total personal service and nonpersonal service use these lines.

2/ Applies to General Fund reimbursable accounts or closed pension systems only.

3/ List each Maintenance Undistributed Appropriation separately.

* Transfer in within 5%.

1983-84
FISCAL AND PERSONNEL OPERATING PLAN
GENERAL FUND
Agency-OMRDD Program-Quality Assurance

PART 1. FISCAL REQUIREMENTS

| | (A) 1983-84 Executive Budget Recommended Approps. | (B) 1983-84 Agency Implement. Plan | (C) Change |
|------------------|--|--|---------------|
| Personal | | | |
| Svc. Reg. | 5,424,000 | 3,381,100 | -42,900 |
| Temp.Svc. | | | |
| Holiday | | | |
| Overtime | 4,000 | 4,000 | 0 |
| Additional | | | |
| Comp. | | | |
| Total /1 | | | |
| Pers.Svc. | 5,128,000 | 3,385,100 | -42,900 |
| Supplies | | | |
| & Mat | 11,000 | 11,000 | 0 |
| Travel | 160,000 | 160,000 | 0 |
| Contractual | | | |
| Svc. | 750,000 | 750,000 | 0 |
| Equipment/2 | 5,000 | 5,000 | 0 |
| FringeBenefits | | | |
| TotalNonpersonal | | | |
| Svc. /1 | 926,000 | 926,000 | 0 |
| Maintenance | | | |
| Undist. /3 | | | |
| Total | | | |
| Approps. | 4,354,000 | 4,311,100 | -42,900* |

1/ In these cases where the appropriations bills show only total personal service and nonpersonal service use these lines.

2/ Applies to General Fund reimbursable accounts or closed pension systems only.

3/ List each Maintenance Undistributed Appropriation separately.

* Transfer out within 5%.

1983-84
FISCAL AND PERSONNEL OPERATING PLAN
GENERAL FUND
Agency-OMRDD Program-Revenue and
 Reimbursement

PART 1. FISCAL REQUIREMENTS

| | (A) 1983-84 Exec. Budget Recommend. Approps. | (B) 1983-84 Agency Implement. Plan | (C) Change |
|---|---|--|------------------|
| Personal Svc. Reg. Temp. Svc. Holiday Overtime Additional Comp. | 5,325,000 | 5,297,800 | -27,200 |
| <hr/> Total Pers.Svc. /1 | <hr/> 5,355,000 | <hr/> 5,327,800 | <hr/> 3 |
| Supplies & Mat. Travel Contractual Svc. Equipment /2 Fringe Benefits | 32,000 126,000 602,000 10,000 | 32,000 126,000 602,000 10,000 | 0 0 0 0 |
| <hr/> Total NonPers Svc. | <hr/> 770,000 | <hr/> 770,000 | <hr/> 0 |
| Maintenance Undis. /3 Total Approps. | 6,125,000 | 6,097,800 | -27,200* |

1/ In those cases where the appropriations bills show only total personal service and nonpersonal service these lines.

2/ Applies to General Fund reimbursable accounts or closed pension systems only.

3/ List each Maintenance Undistributed Appropriation separately.

* Transfer out within 5%.

| | | | |
|-------------------------------------|-------------|----------------|----------|
| 1983-84 | | | |
| FISCAL AND PERSONNEL OPERATING PLAN | | | |
| GENERAL FUND | | | |
| Agency-OMRDD | Program-IBR | | |
| PART 1. FISCAL REQUIREMENTS | | | |
| | (A) | (B) | (C) |
| | 1983-84 | 1983-84 | Change |
| | Executive | Agency | |
| | Recommended | Implementation | |
| | Approps. | Plan | |
| Personal | | | |
| Svc. Reg. | 5,939,000 | 6,059,400 | +120,400 |
| Temp.Svc. | 47,000 | 0 | 47,000 |
| Holiday | | | |
| Overtime | 38,000 | 38,000 | 0 |
| Additional | | | |
| Comp. | 6,000 | 6,000 | 0 |
| Total | | | |
| Pers.Svc. /1 | 6,030,000 | 6,103,400 | +73,400 |
| Supplies | | | |
| & Mat. | 1,410,000 | 1,410,000 | 0 |
| Travel | 13,000 | 13,000 | 0 |
| Contractual | | | |
| Svc. | 669,000 | 669,000 | 0 |
| Equipment /2 | 294,000 | 294,000 | 0 |
| Fringe Benefits | | | |
| Total NonPers | | | |
| Svc. /1 | 2,386,000 | 2,386,000 | 0 |
| Maintenance | | | |
| Undist. | | | |
| Total | | | |
| Approps. | 8,416,000 | 8,489,400 | +73,400 |
| Loss Offset by | | | |
| Approp. in Special | | | |
| Revenue Funds | 613,000 | 613,000 | 0 |
| Total | - | | |
| Appropriations | 7,803,000 | 7,876,400 | +73,400 |

1/ In those cases where the appropriations bills show only total personal service and nonpersonal service use these lines.

2/ Applies to General Fund reimbursable accounts or closed pension systems only.

3/ List each Maintenance Undistributed Appropriation separately.

1983-84
FISCAL AND PERSONNEL OPERATING PLAN
GENERAL FUND

Agency-OMRDD Program-Court Ordered

PART 1. FISCAL REQUIREMENTS

| | (A) 1983-84 Executive Budget Recommended Approps. | (B) 1983-84 Agency Implement. Plan | (C) Change |
|------------------|--|--|---------------|
| Personal | | | |
| Svc. Reg. | 791,000 | 791,000 | 0 |
| Temp Svc. | | | |
| Holiday Overtime | | | |
| Additional | | | |
| Comp. | 130,000 | 130,000 | 0 |
| Total | <hr/> | <hr/> | <hr/> |
| Pers. Svc./1 | 921,000 | 921,000 | 0 |
| Supplies | | | |
| & Mat | 8,000 | 8,000 | 0 |
| Travel | 19,000 | 19,000 | 0 |
| Contractual | | | |
| Svc. | 23,000 | 23,000 | 0 |
| Equipment /2 | | | |
| Fringe Benefits | | | |
| Total/1 | | | |
| Nonpers. Svc. | 50,000 | 50,000 | 0 |
| Maintenance | | | |
| Undistributed/3 | | | |
| Total Approps. | <hr/> 971,000 | <hr/> 971,000 | <hr/> 0 |

1/ In those cases where the appropriations bills show only total personal service and nonpersonal service use these lines.

2/ Applies to General Fund reimbursable accounts or closed pension systems only.

3/ List each Maintenance Undistributed Appropriation separately.

1983-84 FISCAL AND PERSONNEL
OPERATING PLAN GENERAL FUND

Agency: OMRDD Program: Prevention and Care/
Institutional Services

PART 1. FISCAL REQUIREMENTS

| | (A) Executive Budget Recommended Approps. | (B) Agency Implementation Plan | (C) Change |
|---------------------|---|---|---------------|
| Personal | | | |
| Svc. Reg. | 377,880,000 | 377,806,600 | -73,400 |
| Temp Svc. | 921,000 | 921,000 | |
| Holiday | | | |
| Overtime | 6,834,000 | 6,834,000 | |
| Additional | | | |
| Comp. | 1,396,000 | 1,396,000 | |
| Total | <hr/> | <hr/> | <hr/> |
| Pers.Svc. | 387,031,000 | 386,757,600 | -73,400 |
| Nonpersonal | | | |
| Service | | | |
| Supplies | | | |
| & Mat | 42,516,000 | 42,516,000 | |
| Travel | 2,608,000 | 2,608,000 | |
| Contractual | | | |
| Svc. | 29,998,000 | 29,998,000 | |
| Equipment | 2,391,000 | 2,391,000 | |
| Total | <hr/> | <hr/> | <hr/> |
| NonPersSvc | 77,513,000 | 77,513,000 | 0 |
| Maintenance | | | |
| Undistributed | | | |
| Institutional Staff | | | |
| Training and | | | |
| Development | 400,000 | 400,000 | |

| | | | |
|------------------|-------------|-------------|---------|
| Multiply | | | |
| Disabled | 1,958,000 | 1,958,000 | |
| Humanization | 2,000,000 | 2,000,000 | |
| Title XIX- | | | |
| Outside Hospital | | | |
| Care | 2,809,000 | 2,809,000 | |
| | | Page 2 | |
| Chapter 66 | 1,032,000 | 1,032,000 | |
| Laundry | 1,951,000 | 1,951,000 | |
| Behavior | | | |
| Modification | 2,414,000 | 2,414,000 | |
| Private School | | | |
| Tuition | 403,000 | 403,000 | |
| Comm Placed | | | |
| Day Programs | 1,124,000 | 1,124,000 | |
| Total Maint | | | |
| Undis. | 14,091,000 | 14,091,000 | 0 |
| Total | | | |
| Approps. | 478,635,000 | 478,561,600 | -73,400 |

1983-84 FISCAL AND PERSONNEL
OPERATING PLAN GENERAL FUND

Agency: OMRDD Program: Community
Services

PART 1. FISCAL REQUIREMENTS

| | (A) Executive Budget Recommend Appropriations | (B) Agency Implementation Plan | (C) Change |
|-------------|--|---|---------------|
| Personal | | | |
| Svc. Reg. | 87,371,000 | 87,413,700 | +42,700 |
| TempSvc. | 443,000 | 443,000 | |
| Holiday | | | |
| Overtime | 1,028,000 | 1,028,000 | |
| Additional | | | |
| Comp. | 27,000 | 27,000 | |
| Total | | | |
| Pers. Svc. | 88,869,000 | 88,869,000 | +42,700* |
| Nonpersonal | | | |
| Service | | | |
| Supplies & | | | |
| Materials | 4,685,000 | 4,685,000 | |
| Travel | 1,071,000 | 1,071,000 | |
| Contractual | | | |
| Service | 3,319,000 | 3,319,000 | 0 |
| Equipment | 627,000 | 627,000 | |
| Total | | | |
| NonPersSvc | 9,702,000 | 9,702,000 | 0 |
| Maintenance | | | |
| Undistr. | | | |
| Supplies | 15,560,000 | 15,560,000 | |

| | | | |
|--------------|-----------|-----------|--|
| Day | | | |
| Program | 1,338,000 | 1,338,000 | |
| ICF | 4,246,000 | 4,246,000 | |
| DayTreatment | 1,707,000 | 1,707,000 | |

Page 2

| | | | |
|--------------|-------------|-------------|----------|
| Total Maint. | | | |
| Undist. | 22,851,000 | 22,851,000 | 0 |
| Total | | | |
| Approps. | 121,442,000 | 121,464,700 | +42,700* |

*Transfer in of \$42,700 from Q.A.

A-79

1983-84 FISCAL AND PERSONNEL
OPERATING PLAN GENERAL FUND

Agency: OMRDD

2. PERSONNEL PLAN

(For Positions funded from Personal
Service Regular)

| | (A) Executive Budget Recommended Funded Positions | (B) Agency Implementation Plan | (C) Change |
|----------------------------|--|---|---------------|
| | (number of positions) | | |
| Prevention and Care | | | |
| Residential | 20931 | 20931 | 0 |
| Prevention and Care | | | |
| Community | 4769 | 4769 | 0 |
| Executive Management | 297 | 297 | +12 |
| Assurance | 114 | 114 | 0 |
| Revenue & Reimbursement | 263 | 263 | 0 |
| Research | 220 | 220 | 0 |
| Court Ordered | 31 | 31 | 0 |
| Total No. of Positions | <hr/> 26625 | <hr/> 26637 | <hr/> +12 |

1983-84 FISCAL AND PERSONNEL
OPERATING PLAN GENERAL FUND

Agency: OMRDD A&C Payroll Code: 51000

PART 3. ABOLISHED POSITIONS
(Which were funded in 1982-83 Budget)

| Name of Program | Item # | Title | *Salary | Vacant or Filled |
|----------------------|--------|--------------------------------------|---------|------------------------|
| Executive Management | | | | |
| | 11615 | MR Policy Spec.III | 35,282 | Filled |
| | 90101 | Project Director | 34,989 | Filled |
| | 11005 | Director of Consent Decree | 54,248 | Filled |
| | 11035 | Consent Decree Tech Assist. | 34,592 | Filled |
| | 12605 | Director of Volunteer Services | 34,381 | Filled |
| | 12702 | Ast.Coord Foster Grandpar. | 24,224 | Filled |
| | 90803 | StndsComp Anal IV | 37,326 | Filled |
| | 90824 | Stnds Comp AnalII-G23 | 27,790 | Filled |
| | 90826 | StndsComp AnalIi-G23 | 29,004 | Filled |
| | 90830 | Project Asst. G-23 | 28,112 | Filled |
| | 12935 | -Sr.Bldg.Constr. Eng. G-24 | 32,837 | Filled |
| | 13355 | Steno. | 9,807 | Filled |

| | | | |
|-------|---|--------|--------|
| 13510 | Deputy Dir. County Serv GroupG-MV11 | 62,657 | Filled |
|-------|---|--------|--------|

| | | | |
|-------|-------------------------------|--------|--------|
| 13516 | Asst. Director Program Ops | 45,991 | Filled |
|-------|-------------------------------|--------|--------|

*Salary Range

Page 2

| | | | |
|-------|--------------------------------|--------|--------|
| 13884 | Steno | 9,807 | Filled |
| 15210 | Office Svc Manager | 29,711 | Filled |
| 15915 | MH Staff Devel Spec. IV | 28,250 | Filled |
| 15920 | Agency Training Devel Spec. | 24,291 | Filled |
| 10052 | DevDis Program Aid | 13,724 | Filled |
| 10240 | Admin Assist G-18 | 25,05 | Filled |
| 90816 | Project Assistant | 31,240 | Filled |
| 90850 | Project Assistant | 27,330 | Filled |

Layoffs Scheduled after 4/1/83

| | | | |
|-------|------------------------|--------|--------|
| 90381 | Program Assistant | 28,348 | Filled |
| 90214 | MR Audit Specialist | 28,480 | Filled |

Items to be Transferred 4/1/83 to the Bureau of
Revenue and Reimbursement

| | | | |
|-------|------------------------------|--------|--------|
| 11715 | MR Policy Devel Spec. III | 31,978 | Filled |
| 11730 | MR Policy Devel 50% time | 28,221 | Filled |
| | | -50% | |
| | MR Policy Devel 50% time | 26,640 | Filled |
| | | -50% | |

| | | | |
|-------|-----------------|--------|--------|
| 90208 | MR Policy Devel | | |
| | Spec II | 28,297 | Filled |
| 90221 | MR Policy Devel | | |
| | Spec I | 21,050 | Filled |

Item to be Transferred 4/1/83 to the Bureau of Quality Assurance

| | | | |
|-------|----------------------|--------|--------|
| 11030 | Standards Compliance | | |
| | Analyst | 33,228 | Filled |

Total salary from pages 1 & 1
975,000

Page 3

| | | |
|---------|------------------|--------|
| **13530 | Asst. Dir County | |
| | Svc Group | 52,703 |
| **13630 | Asst. Dir C.S. | |
| | Plan&Admin. | 51,854 |

Items to be Transferred 4/1/83 to Bronx D.C.

| | | |
|----------|-------------------------------|---------|
| ***13720 | Mental Hygiene Program | |
| | Analyst | 42,858 |
| | - Net savings accrued through | |
| | demotions | 16,500 |
| | TOTAL | 991,500 |

- * 1982-83 Salary Range
- ** Demotion
- *** Substitution for previously planned layoff.

PART 3. ABOLISHED POSITIONS (WHICH WERE FUNDED
IN 1982-83 BUDGET)

Quality Assurance

| | | | |
|---------|---|---------|--------|
| 20055 | AdminAssist G-18 | 24,291 | filled |
| 20160 | Audit Special II | 27,216 | filled |
| 20166- | Audit Special II | 27,215 | filled |
| 20181 | Audit SpecI Trainee | 20,492 | filled |
| 20183 | Audit SpecI G-18 | 20,492 | filled |
| | TOTAL | 138,778 | |
| **20061 | Audit Spec III | 36,840 | filled |
| | - net savings accrued through demotion | 9,000 | |
| | TOTAL | 147,800 | |

* 1982-83 salary range

** Demotion

Revenue and Reimbursement

| | | | |
|-------|-----------------------------|--------|--------|
| 30135 | Resource & Reimburs G-23 | 29,711 | filled |
| 30160 | Agency Trang | 21,630 | filled |
| 30161 | Agy Trang | 21,630 | filled |
| 30162 | Agy Trang Spec I G-18 | 20,492 | filled |
| 30163 | Agy Trang Spec I trainee | 24,291 | filled |

| | | | |
|-------|-------|---------|--------|
| 30196 | Steno | 11,118 | filled |
| | TOTAL | 128,872 | |

PART 3. ABOLISHED POSITIONS (WHICH WERE FUNDED
IN 1982083 BUDGET)

Institute for Basic Research

| <u>Title</u> | <u>Item #</u> | <u>Salary*</u> | <u>Vacant/Filled</u> |
|--------------|---------------|----------------|----------------------|
| Dev.Spec.III | 12540 | 25,566 | filled |
| Nurse II | 15300 | 21,800 | filled |
| Nurse II | 15301 | 21,800 | filled |
| Nurse II | 15302 | 21,800 | filled |
| Nurse II | 15303 | 21,800 | filled |
| Nurse II | 15304 | 21,800 | filled |
| Nurse II | 15305 | 21,800 | filled |
| Nurse II | 15306 | 21,800 | filled |
| Nurse II | 15307 | 21,800 | filled |
| Nurse II | 15308 | 21,800 | filled |
| MHTA | 16700 | 14,441 | filled |
| MHTA | 16701 | 14,441 | filled |

| | | | |
|-------------|-------|--------|--------|
| MHTA | 16702 | 14,585 | filled |
| MHTA | 16703 | 15,542 | filled |
| MHTA | 16704 | 14,585 | filled |
| MHTA | 16705 | 14,441 | filled |
| MHTA | 16706 | 14,441 | filled |
| MHTA | 16707 | 15,536 | filled |
| MHTA | 16708 | 14,441 | filled |
| MHTA | 16709 | 15,589 | filled |
| MHTA | 16710 | 12,978 | filled |
| MHTA | 16711 | 15,541 | filled |
| MHTA | 16712 | ----- | vacant |
| Res.Sc. II | 29023 | 25,283 | filled |
| Res.Sc. V 1 | 28856 | 41,454 | filled |
| Res.Sc. IV | 28895 | 33,750 | filled |

*1982-83 Salary Range

1983-84 FISCAL AND PERSONNEL
OPERATING PLAN GENERAL FUND

AGENCY: OMRDD A&C PAYROLL CODE: Craig (51260)
Residential

PART 3. ABOLISHED POSITIONS (WHICH WERE FUNDED
IN 1982-83 BUDGET)

Name of Program: Craig

| <u>Title</u> | <u>Item #</u> | <u>Salary*</u> | <u>Vacant or Filled</u> |
|----------------|---------------|----------------|-------------------------|
| Audiologist | | | |
| G-18 | 14900 | 24,184 | F |
| Speech Path | 14834 | | |
| G-18 (2) | 14835 | 48,367 | F |
| Occup Ther | | | |
| Assistant G-14 | 11831 | 19,442 | F |
| Maint Assist | | | |
| Carpenter G-8 | 7352 | 13,400 | F |
| MH Therapy | 16932- | | |
| Aide G-9 (4) | 16935 | 56,032 | F |
| Motor Veh Oper | 6462- | | |
| G-7 (2) | 6463 | 25,132 | F |
| Sr. Launderer | | | |
| G-7 | 27062 | 12,566 | F |
| Food Svc Wkr | 27951- | | |
| G-4 (2) | 27952 | 21,482 | F |
| Inst Safety | | | |
| Officer G-9 | 6150 | 14,507 | F |
| TOTAL (15) | | 235,112 | |

A-87

Name of Program:

J.N. ADAM D.C.

Payroll Code: JN Adam Res. 51300

PART 3. ABOLISHED POSITIONS (WHICH WERE FUNDED
IN 1982-83 PAYROLL).

| | | | |
|---|--------|----------------|---|
| Supervisor, Vocational Rehabilit. G-23 | 14110 | 31,256 | F |
| MH Program Eval Spec. IV, G-27 | 00610 | 38,490 | F |
| Foster Grandparent Prog. Assist, G-14 | 25360 | 19,442 | F |
| Barber, G-7 | 29380 | 13,197 | F |
| TOTAL ITEMS: 4 | TOTAL: | <u>102,385</u> | |

A & C PAYROLL CODE: Monroe - Residential 51780

Name of Program: Monroe

PART 3. ABOLISHED POSITIONS (WHICH WERE FUNDED
IN 1982-83 PAYROLL)

| | | | |
|--------------------|--------|--------|--------|
| Motor Vehicle | 6457- | | |
| Operator (2) | 6458 | 25,132 | Filled |
| Cleaner (2) | 26326- | | |
| | 26327 | 21,482 | Filled |
| Telephone Operator | 6021 | 10,741 | Filled |
| Asst. Librarian | 25140 | 18,540 | Filled |
| | | <hr/> | |
| | TOTAL | 75,895 | |

A & C PAYROLL CODE: 51220 Newark DC - Res.

Name of Program: Newark DC

PART 3. ABOLISHED POSITIONS (WHICH WERE FUNDED
IN 1982-83 BUDGET)

| | | | |
|--|-----------------|---------------|---|
| (2) Chief of Service | 10002- 10003 | 104,142 | F |
| (1) Clinical Phys. III | 10070 | 48,602 | F |
| (1) Pathologist | 28300 | 48,602 | F |
| (2) Rehab Counselor | 14120- 14121 | 50,923 | F |
| (3) Devel. Specialist | 12544- 12546 | 76,445 | F |
| (1) Devel. Specialist | 12701 | 22,894 | F |
| (6) Teacher IV, G-17 | 12994- 12999 | 137,364 | F |
| (1) Team Leader, M-1 | 10104 | 34,323 | F |
| (1) Senior Minority Group Counsel. G-18 | 00440 | 24,236 | F |
| (1) Utilization Review Coordinator | 00910 | 25,482 | F |
| (1) Food Service Manager | 27630 | 19,590 | F |
| (21) | | <hr/> 614,270 | |

A & C PAYROLL CODE: West Seneca Residential
Name of Program: 51330 West Seneca
 PART 3. ABOLISHED POSITIONS (FUNDED IN 1982-83)

| | | | |
|--------------------------|----------|---------|---|
| (1) L.P.N. | 18771 | 14,008 | F |
| (1) Clerk, G-3 | 00356 | 10,258 | F |
| (4) Devel. Specialist | 12710- | | |
| G-17 | 12713 | 91,576 | F |
| (1) Rehab Assist I G-11 | 14200 | 16,423 | F |
| (11) Cleaner G-4 | 26388- | | |
| | 26398 | 118,151 | F |
| (1) Housekeeper G-6 | 26226 | 11,895 | F |
| (7) Food Service G-4 | 28005-11 | 75,187 | F |
| (1) Motor Veh. Oper | 06476 | 12,566 | F |
| (1) Super of Volunteer | | | |
| Services G-14 | 25340 | 19,442 | F |
| (1) Sp&Hearing Asst G-14 | 15032 | 19,442 | F |
| (1) Psychologist G-23 | 11030 | 31,256 | F |
| (1) Psych Assist II | 11212 | 19,442 | F |
| (1) Recreat. Ther. | 12085 | 19,442 | F |
| (1) Devel. Specialist | 12709 | 22,894 | F |
| (1) SW Assist III | 11534 | 21,666 | F |
| (1) SW I | 11457 | 22,894 | F |
| (1) Food Svc Worker I | 28004 | 10,741 | F |
| (1) Steno | 29438 | 11,275 | F |

TOTAL: 37

548,558

A & C PAYROLL CODE: Syracuse (51240)
Residential

Name of Program: Syracuse

PART 3. ABOLISHED POSITIONS (WHICH WERE FUNDED
IN 1982-83 PAYROLL)

| | | | |
|---------------------|----------|----------|---|
| Barber, G-8 | 29380 | - 13,919 | F |
| Beautician, G-8 | 29400 | 13,919 | F |
| Food Svc Wker (2) | 27958-59 | 21,482 | F |
| Safety Officer, G-9 | 6148 | 14,008 | F |
| Plumber, G-12 | 7211 | 16,559 | F |
| Dir, Educ & Train | 25000 | 42,572 | F |
| Supvr Vol Svcs | 25340 | 19,442 | F |
| Teacher IV G-17(6) | 12990-95 | 137,364 | F |
| Teacher Assist (3) | 13160-62 | 44,067 | F |
| Nurse I, G-14 | 13789 | 19,442 | F |
| Sr. REc Ther, G-17 | 12023 | 22,894 | F |
| Dentist, G-28 | 10850 | 40,485 | F |
| Dev Spec II | 12700 | 22,894 | F |
| Dev Spec III (2) | 12541-42 | 50,964 | F |
| -Soc Wrkr Supv III | 11310 | 34,323 | F |
| Licensed Prac. Nur. | 18711 | 14,008 | F |
| Soc Wrkr Asst II | 11600 | 19,442 | F |

TOTAL (27)

547,784

A & C PAYROLL CODE: O.D. Heck Res 51760

Name of Program: O.D. Heck D.C.

PART 3. ABOLISHED POSITIONS (WHICH WERE FUNDED
IN 1982-83 BUDGET)

| | | | |
|----------------|-------|--------|--------|
| Nurse Admin. I | 13662 | 25,700 | Filled |
|----------------|-------|--------|--------|

1983-84 FISCAL AND PERSONNEL OPERATING PLAN
GENERAL FUND

Agency: OMRDD A&C Payroll Code: LVDC Resid.
51210

PART 3. ABOLISHED POSITIONS (WHICH WERE FUNDED
IN 1982-83 BUDGET)

Name of Program: Letchworth Village D.C.

| Title | Item # | *Salary | Vacant/ Filled |
|-----------------------------------|-----------|-----------|-------------------|
| (11) Clothing Clerk | 25921-31 | 118,151 | Filled |
| Stores Clerk | 25870 | 11,275 | Filled |
| (100) Ward Aide | 26712-811 | 1,074,100 | Filled |
| (23) Cleaner | 26401-23 | 249,324 | Filled |
| Dietetic Tech. | 27740 | 14,008 | Filled |
| (3) Psychiatric Attendant | 27800-02 | 35,685 | Filled |
| (9) Food Service Worker I | 28074-82 | 96,669 | Filled |
| (2) Food Service Worker II | 27892-93 | 25,132 | Filled |
| Welder | 07251 | 16,559 | Filled |
| Maint. Asst. Carpenter | 07351 | 13,265 | Filled |
| (3) Maint. Assist. Electrician | 07370-72 | 39,795 | Filled |

| | | | |
|-----------------------------|----------|--------|--------|
| (2) Maint. Asst. Plumber | 07465-66 | 26,530 | Filled |
| Roofer/Tinsmith | 07232 | 16,559 | Filled |

Page 2

| | | | |
|------------------------------------|----------------------------------|---------|--------|
| (3) Grounds Worker | 06339-41 | 35,685 | Filled |
| (4) Institutional Worker | 06542-45 | 41,032 | Filled |
| (71) D.M.T. | 00515-16 00344-46 29530-95 | 762,611 | Filled |
| (3) Sr. Steno | 29334-36 | 42,024 | Filled |
| Beautician | 29402 | 12,566 | Filled |
| (3) Staff Development Spec. III | 25041-43 | 72,550 | Filled |
| Staff Development Spec. II | 25111 | 19,442 | Filled |
| Photographer II | 28380 | 16,423 | Filled |
| Chaplain | 28703 | 26,782 | Filled |
| Clinical Physician III | 10070 | 55,561 | Filled |
| Psychiatrist III | 10030 | 58,768 | Filled |
| (9) Team Leader | 10120-28 | 308,907 | Filled |
| Education Director | 12510 | 34,323 | Filled |

| | | | |
|---------------------------|----------|---------|--------|
| Clinical Physician | II10634 | 54,867 | Filled |
| (2) Clinical Physician II | 10619-20 | 120,948 | Filled |
| Medical Specialist | 10572 | 57,636 | Filled |

Page 3

| | | | |
|------------------------------------|----------|---------|--------|
| (3) Medical Specialist II | 10539-41 | 168,705 | Filled |
| Dental Hygienist | 10873 | 15,528 | Filled |
| (3) Teacher Assist. | 13150-52 | 44,067 | Filled |
| (17) Teacher IV | 12982-98 | 389,198 | Filled |
| (4) Psychologist I | 11126-29 | 112,796 | Filled |
| (3) Psychology Assist. III | 11170-72 | 64,999 | Filled |
| (17) Recreation Worker | 12245-61 | 330,514 | Filled |
| (3) Sr. Recreation Therapist | 12043-45 | 68,682 | Filled |
| (15) Occupation Therapy Assist. II | 11860-74 | 291,630 | Filled |
| (10) Rehab. Asst. II | 14255-64 | 194,420 | Filled |
| (2) Rehab Counselor | 14128-29 | 50,963 | Filled |

| | | | |
|--------------------------------|----------|---------|--------|
| (5) Social Worker Asst. III | 11526-30 | 108,332 | Filled |
| (5) Devel. Spec. II | 12701--5 | 114,470 | Filled |
| *Project Director | 90008 | 31,566 | Filled |
| Head Recreation Therapist | 12010 | 26,782 | Filled |
| Personnel Admin. | 00430 | 24,184 | Filled |

*Position to be filled through April 30th.

Page 4

| | | | |
|------------------------------------|-----------|---------|--------|
| Staff Dev. Specialist I | 25153 | 16,423 | Filled |
| Asst. Audiologist | 15000 | 21,666 | Filled |
| Asst. Speech Pathologist | 14937 | 21,666 | Filled |
| (3) Sr. Recreation Therapist | 12040-42 | 68,682 | Filled |
| (2) Recreation Therapist, Music | 12176-77 | 38,884 | Filled |
| (5) Recreation Therapist | 12089-93 | 97,210 | Filled |
| (10) Rehab. Assist. II | 14245-54 | 194,420 | Filled |
| (3) Cleaner | 26398-400 | 51,665 | Filled |

A-97

| | | | |
|--|----------|---------|--------|
| Central Supply Tech | 28232 | 11,895 | Filled |
| (19) MH Ther. Aides | 18170-88 | 266,152 | Filled |
| Head Psychiatric Attendant | 15550 | 18,540 | Filled |
| TOTAL POSITIONS: 400 TOTAL: 6,320,658 | | | |

AGENCY: OMRDD

A & C PAYROLL CODE: 51250 Wassaic-Res.

Name of Program: Wassaic

PART 3. ABOLISHED POSITIONS (WHICH WERE FUNDED IN 1982-83 BUDGET)

| | | | |
|---------------------------------------|----------|--------|--------|
| (1) Stenographer | 29444 | 11,275 | Filled |
| (1) D.M.T. | 29531 | 10,741 | Filled |
| (1) Nurse Instruct. | 25080 | 25,481 | Filled |
| (1) Sr. Librarian | 25100 | 24,183 | Filled |
| (3) Grounds Worker | 06340-42 | 35,685 | Filled |
| (3) Main. Assistant Painter | 07447-49 | 39,795 | Filled |
| (1) Maintenance Assistant | 07325 | 13,265 | Filled |
| (3) Main. Assist. Plumber/Steamfitter | 07465-67 | 39,795 | Filled |
| (1) Maint. Assist. Mason | 07413 | 13,265 | Filled |

| | | | |
|---------------------------------|-----------|--------|--------|
| (1) Maint. Assist. Roofer | 07501 | 13,265 | Filled |
| (3) Maint. Assist. Electric. | 07373-75 | 39,795 | Filled |
| (3) Maint. Assist Carpenter | 07354-56 | 39,795 | Filled |
| (2) Maintenance Helper | 07530-31 | 23,790 | Filled |
| (1) General Mechanic | 07263 | 16,559 | Filled |
| (1) Painter | 07295 | 15,684 | Filled |
| (3) Housekeeper | 262240-42 | 35,685 | Filled |

Page 2

| | | | |
|---|----------|--------|--------|
| (4) Cleaner | 26446-49 | 42,964 | Filled |
| (1) Laundry Super. | 27040 | 14,818 | Filled |
| ** (7) Launderer | 27115-21 | 75,187 | Filled |
| **One item to be transferred to Rome D.C. Laundry. | | | |
| (1) Stores Clerk | 25857 | 11,275 | Filled |
| (1) Psych. Head Attendant | 15550 | 19,442 | Filled |
| (1) Social Worker I | 11461 | 22,894 | Filled |

| | | | |
|----------------------------------|------------------|---------|--------|
| (1) Clinical Physician I | 10646 | 54,867 | Filled |
| (3) Physicians' Assistant | 10700-02 | 72,549 | Filled |
| (5) Teacher IV | 13013-17 | 114,470 | Filled |
| (4) Rehabilitation Assist. II | 14248-51 | 77,768 | Filled |
| (1) Recreation Worker | 12256 | 19,442 | Filled |
| (3) Team Leader | 10119-21 | 102,969 | Filled |
| (4) Social WorkerII | 11354-57 | 101,928 | Filled |
| (1) Ed. Supervisor | 12960 | 25,482 | Filled |
| TOTAL POS.: 70 | TOTAL: 1,279,137 | | |

AGENCY: OMRDD
A & C PAYROLL CODE: Brooklyn (51380)
Residential

Name of Program: Brooklyn

PART 3. ABOLISHED POSITIONS (WHICH WERE FUNDED
IN 1982-83 BUDGET)

| | | | |
|------------------|-----|--------|--------|
| Head Acct. Clerk | 225 | 23,129 | Filled |
| Acct. Clerk | 307 | 11,275 | Filled |

| | | | |
|--------------------------|---------|--------|--------|
| Sr. Inst Safety Officer | 6123 | 17,142 | Filled |
| Inst. Safety Officer (2) | 6170-71 | 29,014 | Filled |
| Sr. Grounds Wrkr | 6320 | 14,008 | Filled |
| Grounds Worker | 6332 | 11,895 | Filled |
| Supvg Electrician | 7130 | 18,540 | Filled |
| Main Assist Painter | 7442 | 13,265 | Filled |
| Main Assist Plumber & SF | 7461 | 13,265 | Filled |
| Treat Team LD MR | 10106 | 34,323 | Filled |
| Soc Wrkr Supvr III | 11310 | 34,323 | Filled |
| Dev Spec V | 12500 | 34,323 | Filled |
| Psol I | 11122 | 28,197 | Filled |
| Teacher IV | 12988 | 22,894 | Filled |
| MH Staff Dev SpecI | 25150 | 16,423 | Filled |
| Assist Librarian | 25140 | 19,442 | Filled |
| Assoc Comptr Syst Anal | 25520 | 31,256 | Filled |
| Supvg Housekeeper | 26156 | 14,008 | Filled |

Page 2

| | | | |
|-----------------|----------|--------|--------|
| Housekeeper (2) | 26212-13 | 23,790 | Filled |
|-----------------|----------|--------|--------|

| | | | |
|------------------|----------|--------|--------|
| Cleaner (4) | 26350-53 | 42,964 | Filled |
| MH WArD Aide (3) | 26740-42 | 32,223 | Filled |
| Dietitian Techn | 27732 | 14,008 | Filled |
| Steno | 29432 | 11,275 | Filled |

TOTAL: 30

TOTAL: 510,982

AGENCY: OMRDD

A & C PAYROLL CODE: Manhattan (51600)
Residential

Name of Program: Manhattan

PART 3. ABOLISHED POSITIONS (WHICH WERE FUNDED
IN 1982-83 BUDGET)

| | | | |
|---------------------------------|----------|--------|--------|
| Dir Ist Hmn Rsrc | 405 | 38,108 | Filled |
| Telephone Oper | 6021 | 10,741 | Filled |
| Power Plan Helper | 6980 | 11,895 | Filled |
| Medical Spec II | 10522 | 64,152 | Filled |
| Soc Work Supvr III | 11310 | 34,323 | Filled |
| MH Nurse Prog Supvr | 13620 | 34,323 | Filled |
| Sr. Recreation Therapist (3) | 12023-25 | 68,682 | Filled |
| Psychologist II | 11022 | 31,256 | Filled |
| Dev Spec V | 12500 | 34,323 | Filled |
| Dev Spec III | 12541 | 25,482 | Filled |
| Teacher IV | 12980 | 22,894 | Filled |
| Teacher IV (2) | 12981-82 | 45,788 | Filled |
| Teacher Assist (2) | 13150-51 | 29,378 | Filled |
| Assist Speech Path | 14930 | 21,667 | Filled |
| Suprv Housekeeper | 26153 | 14,008 | Filled |

| | | | |
|---------------------|----------|---------|--------|
| Ward Aide (3) | 26705-07 | 32,223 | Filled |
| MH Ther Asst II (5) | 15631-35 | 87,660 | Filled |
| MH Ther Aides (10) | 16849-58 | 140,080 | Filled |

Page 2

| | | | |
|-----------------------------|--------|---------|--------|
| Treat Team Leader | 10104 | 34,323 | Filled |
| MH Staff Dev Spec III | 25042 | 23,129 | Filled |
| Foster Grandpar Prog Cor | 25330 | 20,693 | Filled |
| TOTAL: 40 | TOTAL: | 825,128 | |

AGENCY: OMRDD
A & C PAYROLL CODE: B.M. Fineson-
Residential 51470

Name of Program: B.M. Fineson

PART 3. ABOLISHED POSITIONS (WHICH WERE FUNDED
IN 1982-83 BUDGET)

| | | |
|--------------------------------|--------|--------|
| Habilitation Spec I 13458 | 19,442 | Filled |
| Habilitation Spec I 13459 | 19,442 | Filled |
| Soc Worker Assist III 11527 | 21,667 | Filled |
| Sr. Stenographer 29322 | 14,008 | Filled |
| Clerk 29640 | 10,258 | Filled |

TOTAL: 84,817

AGENCY: OMRDD

A & C PAYROLL CODE: 51250 - Wass. Laund.

Name of Program: Wassaic Laundry

PART 3. ABOLISHED POSITIONS (WHICH WERE FUNDED
IN 1982-83 BUDGET)

| | | | |
|--------------------|----------|---------|--------|
| Sr. Launderer, G-7 | 30060 | 12,600 | Filled |
| Launderer G-4(13) | 30100-12 | 139,600 | Filled |
| Temp. Launderer | 90013 | 10,700 | Filled |

TOTAL: 15

TOTAL: 162,900

AGENCY: OMRDD
A & C PAYROLL CODE: Craig Community 51260

Name of Program: Craig

PART 3. ABOLISHED POSITIONS (WHICH WERE FUNDED
IN 1982-83 BUDGET)

| | | | |
|------------------------------|-------|--------------|--------|
| (1) Sr. Steno | 35100 | 14,700 | Filled |
| (1) Com Placement Spec. I | 35323 | 23,400 | Filled |
| (1) Soc. Worker Assist II | 35550 | 17,600 | Filled |
| (1) Soc. Worker I | 44771 | 22,600 | Filled |
| TOTAL: | | <hr/> 78,300 | |

AGENCY: OMRDD

A & C PAYROLL CODE: J.N. Adam-Comm. 51300

Name of Program: J.N. Adam

PART 3. ABOLISHED POSITIONS (WHICH WERE FUNDED
IN 1982-83 BUDGET)

| | | | |
|----------------------------------|------------------|--------|--------|
| (2) DDPS I | 35053-54 | 58,500 | Filled |
| Treatment Team Leader | 35200 | 35,000 | Filled |
| M.H. Therapy Assist. II | 35225 | 19,400 | Filled |
| (2) Social Worker Assist. III | 35500-01 | 46,000 | Filled |
| (2) Social Worker Assist. II | 35402-03 | 50,100 | Filled |
| Social Worker I | 35440 | 21,900 | Filled |
| MH Therapy Asst. II | 35700 | 18,900 | Filled |
| Psychology Asst III | 46450 | 20,300 | Filled |
| Rehab Counselor II | 39701 | 23,300 | Filled |
| (2) Rehab Assist | 39704-05 | 38,000 | Filled |
| TOTAL: 14 | TOTAL: \$331,400 | | |

AGENCY: OMRDD

A & C PAYROLL CODE: Monroe (51780) Community

Name of Program: Monroe

PART 3. ABOLISHED POSITIONS (WHICH WERE FUNDED
IN 1982-83 BUDGET)

| | | | |
|------------------------------|----------|--------|--------|
| DDPS II | 35031 | 39,400 | Filled |
| DDPS I | 35053 | 28,800 | Filled |
| (3) Steno | 35120-22 | 39,000 | Filled |
| (2) Soc Worker Assist III | 35510-11 | 45,800 | Filled |
| Soc. Worker I | 35442 | 21,600 | Filled |

TOTAL: 8

TOTAL: \$174,600

AGENCY: OMRDD

A & C PAYROLL CODE: Newark-Comm. 51220

Name of Program: Newark D.C.

PART 3. ABOLISHED POSITIONS (WHICH WERE FUNDED
IN 1982-83 BUDGET)

| | | | |
|------------------------------------|----------|--------|--------|
| Chief of Service | 35000 | 56,900 | Filled |
| (2) DDPS II | 35031-32 | 69,000 | Filled |
| DDPS I | 35053 | 27,500 | Filled |
| (3) Community Placement Spec. I | 35323-25 | 70,200 | Filled |

TOTAL: 7

TOTAL: \$223,600

AGENCY: OMRDD

A & C PAYROLL CODE: West Seneca (51330)
Community

Name of Program: West Seneca

PART 3. ABOLISHED POSITIONS (WHICH WERE FUNDED
IN 1982-83 PAYROLL)

| | | | |
|-----------------|----------|---------|--------|
| (6) DDIS I | 35051-56 | 173,900 | Filled |
| (2) Steno | 35124-25 | 24,000 | Filled |
| Rehab Assist II | 45976 | 19,300 | Filled |
| Psychologist I | 44890 | 25,800 | Filled |
| O.T. Assist II | 45580 | 21,200 | Filled |

TOTAL: 11

TOTAL: \$264,200

A & C PAYROLL CODE: Broome-Comm. 51940

Name of Program: Broome D.C.

PART 3. ABOLISHED POSITIONS (WHICH WERE FUNDED IN 1982-83 BUDGET)

| | | | |
|---------------------|---|---------|--------|
| DDPS I | 35052 | 29,200 | Filled |
| Steno | 35120 | 11,000 | Filled |
| (2) Rehab Counselor | 39600& | | |
| II Voc. | 39800 | 52,600 | Filled |
| Sr. Rec. Ther. | 39604 | 24,800 | Filled |
| (9) MHTA | 39605-06 39701-02 39806-07 46253,42704, 42910 | 140,175 | Filled |
| (4) Rec. Therapist | 39700 39802-04 | 75,400 | Filled |
| (2) Hab. Spec. | 39705 42913 | 37,000 | Filled |
| (2) Steno | 39703 35635 | 23,300 | Filled |
| Rehab Asst I | 39601 | 16,800 | Filled |
| SR. O.T. | 39602 | 22,400 | Filled |
| Speech Pathologist | 45853 | 22,900 | Filled |
| (2) Psychologist I | 44894-95 | 58,100 | Filled |
| D.M.T. | 45220 | 11,100 | Filled |

| | | | |
|--------------------|-------|--------|--------|
| Asst Speech Path | 45880 | 19,800 | Filled |
| Treatment Team Ldr | 45133 | 32,800 | Filled |
| Comm. M.H. Nurse | 44109 | 24,800 | Filled |

TOTAL POSITIONS: 31 TOTAL: \$602,175

AGENCY: OMRDD

A & C PAYROLL CODE: Rome (51230) Community

Name of Program: Rome

PART 3. ABOLISHED POSITIONS (WHICH WERE FUNDED
IN 1982-83 BUDGET)

| | | | |
|---------------------|-------|--------|--------|
| Team Leader | 37702 | 35,300 | Filled |
| M.H. Ther Assist II | 35710 | 19,400 | Filled |
| M.H. Ther Assist II | 35712 | 19,400 | Filled |
| Cleaner | 39702 | 10,500 | Filled |
| (2) Steno | 40103 | | |
| | 40208 | 26,100 | Filled |
| Dev. Spec III | 46120 | 27,500 | Filled |

| | | | |
|--------------------|---------------------|---------------|--------|
| (3) MHTA | 39803-04 & 40107 | 50,200 | Filled |
| Rehab Counselor II | 40213 | 23,300 | Filled |
| Rehab Assist II | 40219 | 18,500 | Filled |
| Clerk | 40209 | <u>10,100</u> | Filled |

TOTAL: 13

TOTAL: \$240,300

AGENCY: OMRDD

A & C PAYROLL CODE: Sunmount (51420) Community

Name of Program; Sunmount

PART 3. ABOLISHED POSITIONS (WHICH WERE FUNDED
IN 1982-83 BUDGET)

| | | | |
|-------------------|----------|--------|--------|
| Chief Comm. Serv. | 35000 | 56,900 | Filled |
| (2) Steno. | 35122-23 | 24,600 | Filled |

| | | |
|----------|--------|----------|
| TOTAL: 3 | TOTAL: | \$81,500 |
|----------|--------|----------|

AGENCY: OMRDD

A & C PAYROLL CODE: Syracuse (51240) Community

Name of Program: Syracuse

PART 3. ABOLISHED POSITIONS (WHICH WERE FUNDED
IN 1982-83 BUDGET)

| | | | |
|--------------------------------|----------|------------------|--------|
| DDPS I | 35052 | 27,800 | Filled |
| Comm Place Spec I | 35323 | 25,200 | Filled |
| (3) MHTA | 44200-02 | 47,100 | Filled |
| Comm Res. Development Coord | 35225 | 32,100 | Filled |
| Comm M.H. Nurse | 44686 | 25,900 | Filled |
| Psychologist II | 39702 | 33,700 | Filled |
| Steno | 45190 | 14,000 | Filled |
| Dietician | 38340 | 17,600 | Filled |
| TOTAL: 10 | | TOTAL: \$223,400 | |

AGENCY: OMRDD

A & C PAYROLL CODE: O.D. Heck Community
51760

Name of Program: O.D. Heck

PART 3. ABOLISHED POSITIONS (WHICH WERE FUNDED
IN 1982-83 BUDGET)

| | | | |
|---------------------------------|------------------------------|--------|--------|
| Treatment Team Leader | 35200 | 36,800 | Filled |
| (2) DDPS | 45132-33 | 73,700 | Filled |
| (4) Steno | 35123-26 | 48,700 | Filled |
| Social Worker Assist. II | 35554 | 20,100 | Filled |
| (4) Rehab. Assist. II | 35709-10 40100 & 45970 | 80,400 | Filled |
| Psychology Asst III | 46453 | 23,000 | Filled |
| (4) M.H. Therapy Assist. II | 35701-03 39913 | 68,480 | Filled |
| (6) MHTA | 35704-08 44214 | 84,000 | Filled |
| (2) Social Worker Assist III | 35509-10 | 45,600 | Filled |
| Psychiatrist II | 46651 | 61,200 | Filled |
| Psychologist II | 44863 | 33,700 | Filled |

| | | | |
|---------------------|----------|--------|--------|
| Psychol. Assist. II | 44205 | 20,700 | Filled |
| (5) Social Worker | | | |
| Assist. II | 44201-04 | | |
| | 44193 | 90,100 | Filled |

Page 2

| | | | |
|--------------------|----------|-------------|--------|
| Rehab Counselor | | | |
| II Voc. | 45940 | 27,000 | Filled |
| (4) Teacher IV | 39706-07 | 95,867 | Filled |
| Comm. M.H. Nurse | 44687 | 25,700 | Filled |
| Comm. M.H. Nurse | 44686 | 25,700 | Filled |
| (3) M.H. Therapy | | | |
| Assist. II | 44208 | | |
| | 46653-54 | 48,600 | Filled |
| (6) MHTA | | | |
| | 46250-54 | | |
| | 44213 | 91,600 | Filled |
| Sr. Rec. Therapist | 45645 | 24,200 | Filled |
| (3) Rec. Therapist | 45672-74 | 59,100 | Filled |
| (3) Rec. Worker | 45703-05 | 53,400 | Filled |
| (2) Nurse II | 44620-21 | 46,100 | Filled |
| Devel Spec. III | 46121 | 26,100 | Filled |
| (2) Sr. O.T. | 45520-21 | 48,300 | Filled |
| Psychol. Asst. III | 46452 | 21,600 | Filled |
| TOTAL POS.: 62 | TOTAL: | \$1,279,747 | |

AGENCY: OMRDD

A & C PAYROLL CODE: Wilton (51290) Community

Name of Program: Wilton

PART 3. ABOLISHED POSITIONS (WHICH WERE FUNDED
IN 1982-83 BUDGET)

| | | | |
|-----------------------------------|----------|--------|--------|
| (3) Community Placement Spec I | 35327-29 | 67,200 | Filled |
|-----------------------------------|----------|--------|--------|

TOTAL POS.: 3

TOTAL: \$67,200

AGENCY: OMRDD

A & C PAYROLL CODE: Letchworth Community 51210

Name of Program: Letchworth

PART 3. ABOLISHED POSITIONS (WHICH WERE FUNDED
IN 1982-83 BUDGET)

| | | | |
|--------------------------|----------|-----------|--------|
| 1 DDPS I | 35055 | 28,700 | Filled |
| 1 Com Place Spec I | 35227 | 24,200 | Filled |
| 1 Psychologist II | 44461 | 31,900 | Filled |
| 1 Psychologist I | 38030 | 28,000 | Filled |
| 2 Social Worker II | 44741-42 | 51,400 | Filled |
| 1 Comm Place Spec I | 35432 | 22,900 | Filled |
| 1 Comm Men Hlth Nurse | 44681 | 23,300 | Filled |
| 1 Nurse II | 44620 | 23,500 | Filled |
| 1 DDPS I | 46657 | 26,900 | Filled |
| 1 Voc Rehab Couns | 45940 | 24,700 | Filled |
| 1 Dietician | 38341 | 18,900 | Filled |
| 2 MHTA | 46653-54 | 30,600 | Filled |
| 1 Steno | 35124 | 12,500 | Filled |
| TOTAL: 15 | TOTAL: | \$347,500 | |

AGENCY: OMRDD

A & C PAYROLL CODE: Wassaic Community 51250

Name of Program: Wassaic

PART 3. ABOLISHED POSITIONS (WHICH WERE FUNDED
IN 1982-83 BUDGET)

| | | | |
|--------------------------|--|---------|--------------------------------------|
| 1 DDPS II | 35032 | 36,600 | Filled |
| 2 Comm Place SpecI | 35324-25 | 45,000 | Filled |
| 2 Social Wrk Asst III | 35508-09 | 44,200 | Filled |
| 2 Social Wrk Asst II | 35565-66 | 37,700 | Filled |
| 1 Steno | 35634 | 12,000 | Filled |
| 2 Social Wrk I | 44200&71 | 45,500 | Filled |
| 9 MHTA | 44204-06, 39907-09, 40009-10, 39807 | 141,500 | Filled Filled Filled Filled |
| 5 MH Asst II | 39601, 40000, 39901-03 | 90,700 | Filled Filled Filled |
| 1 Social Wrk II | 44743 | 25,500 | Filled |
| 1 Psychologist II | 44862 | 32,000 | Filled |
| 2 Psychologist I | 38033, 44892 | 55,900 | Filled Filled |
| 3 Psyc Asst III | 46450-52 | 64,600 | Filled |

| | | | |
|--------------------------|----------|--------|--------|
| 2 Social Wrk Asst III | 46542-43 | 43,100 | Filled |
| 2 Social Wrk Asst II | 46571-72 | 37,800 | Filled |
| 1 Speech Pathol. | 45852 | 22,000 | Filled |

Page 2.

| | | | |
|-----------------------------|-------------------|--------|--------|
| 1 Rec Worker | 38662 | 17,200 | Filled |
| 1 Associate Psychologist | 44830 | 32,000 | Filled |
| | | <hr/> | |
| TOTAL: 38 | TOTAL: \$ 783,300 | | Filled |

AGENCY: OMRDD

A & C PAYROLL CODE: Westchester Community
51910

Name of Program: Westchester

PART 3. ABOLISHED POSITIONS (WHICH WERE FUNDED
IN 1982-83 BUDGET)

| | | | |
|--------------------------|----------|--------|--------|
| 1 DDPS II | 35031 | 34,500 | Filled |
| 1 Rehab Counselor Voc | 35225 | 27,500 | Filled |
| 2 CRA | 44202-03 | 24,900 | Filled |

TOTAL : 4

TOTAL: \$ 86,900

AGENCY: OMRDD

A & C PAYROLL CODE: Suffolk Community 51350

Name of Program: Suffolk

PART 3. ABOLISHED POSITIONS (WHICH WERE FUNDED
IN 1982-83 BUDGET)

| | | | |
|-------------------------------|----------|---------|--------|
| 1 DDPS IV | 35012 | 42,900 | Filled |
| 1 DDPS I | 35055 | 28,700 | Filled |
| 3 Comm Plac Spec I | 35328-30 | 68,500 | Filled |
| 2 Social Wkr I | 35446-47 | 42,700 | Filled |
| 1 Social Wkr II | 44742 | 53,100 | Filled |
| 1 Social Wkr Asst III | 35501 | 18,800 | Filled |
| 4 Comm Mental Health Nurse | 44681-84 | 108,300 | Filled |

TOTAL: 14

TOTAL: \$380,600

AGENCY: OMRDD

A & C PAYROLL CODE: 51450 Bronx Community

Name of Program: Bronx Community

PART 3. ABOLISHED POSITIONS (WHICH WERE FUNDED
IN 1982-83 BUDGET)

| | | | |
|------------------------------------|----------|-----------|--------|
| 2 Treatment Team Leaders | 35202-03 | 70,000 | Filled |
| 2 DDPS I | 35032-33 | 69,300 | Filled |
| 3 DDPS I | 35051-53 | 80,700 | Filled |
| 7 Social Wkr II | 35402-08 | 176,100 | Filled |
| 5 Social Wkr I | 35446-50 | 110,100 | Filled |
| 1 Social Wkr Assist III | 35500 | 22,100 | Filled |
| 2 Community Placement Spec I | 35334-35 | 43,000 | Filled |
| 1 Recreation Wkr | 46660 | 19,900 | Filled |
| 2 Recreation Therapist (Art) | 46661-62 | 39,700 | Filled |
| 1 Community Mental Health Nurse | 44684 | 26,400 | Filled |
| 4 Steno | 45191-94 | 49,500 | Filled |
| 1 Community Mental Health Nurse | 44683 | 26,400 | Filled |
| TOTAL: 31 | TOTAL: | \$733,200 | |

AGENCY: OMRDD

A & C PAYROLL CODE: Brooklyn Community
51380

Name of Program: Brooklyn Community

PART 3. ABOLISHED POSITIONS (WHICH WERE FUNDED
IN 1982-83 BUDGET)

| | | | |
|----------------------------------|----------|---------|--------|
| 1 DDPS II | 35033 | 33,300 | Filled |
| 1 DDPS I | 35056 | 27,300 | Filled |
| 2 Social Worker II | 35402-03 | 51,500 | Filled |
| 2 Social Worker Assist III | 35500-02 | 43,300 | Filled |
| 1 Social Worker Assistant II | 35501 | 19,900 | Filled |
| 11 Community Placement Spec I | 35350-60 | 244,800 | Filled |

TOTAL: 18

TOTAL: \$420,100

AGENCY: OMRDD

A & C PAYROLL CODE: 51470 Fineson Community

Name of Program: Fineson Community

PART 3. ABOLISHED POSITIONS (WHICH WERE FUNDED
IN 1982-83 BUDGET)

| | | | |
|---------------------------------|----------|-----------|--------|
| 1 Treatment Team Leader | 35201 | 37,500 | Filled |
| 1 DDPS II | 35032 | 35,100 | Filled |
| 1 DDPS I | 35052 | 27,700 | Filled |
| 1 Chief/DC Community Svcs | 35001 | 56,900 | Filled |
| 1 Senior Steno | 35103 | 15,400 | Filled |
| 3 Steno | 35121-23 | 37,800 | Filled |
| 3 Community Placement Spec I | 35336-38 | 70,800 | Filled |
| 1 Steno | 35631 | 10,600 | Filled |
| 1 MHTA Assist II | 46653 | 18,400 | Filled |
| 1 Psychology Assist III | 46450 | 21,700 | Filled |
| 1 Psychologist II | 44862 | 32,800 | Filled |
| 1 Psychologist I | 44892 | 28,100 | Filled |
| 4 Social Worker II | 44741-44 | 109,700 | Filled |
| 1 Social Worker Assist III | 46543 | 23,100 | Filled |
| TOTAL: 21 | TOTAL: | \$525,600 | |

AGENCY: OMRDD

A & C PAYROLL CODE: Manhattan Community
51600

Name of Program: Manhattan Community

PART 3. ABOLISHED POSITIONS (WHICH WERE FUNDED
IN 1982-83 BUDGET)

| | | | |
|------------------------------------|----------|--------|--------|
| 2 DDPS I | 35052-53 | 54,600 | Filled |
| 1 Speech & Hearing Therapist | 39200 | 23,000 | Filled |
| 1 Community Mental Health Nurse | 37822 | 26,200 | Filled |

TOTAL: 4

TOTAL: \$103,800

AGENCY: OMRDD

A & C PAYROLL CODE: SIDC Community
51270

Name of Program: SIDC Community

PART 3. ABOLISHED POSITIONS (WHICH WERE FUNDED
IN 1982-83 BUDGET)

| | | | |
|------------------|-------|--------|--------|
| 1 Community | | | |
| Placement Spec I | 35363 | 23,700 | Filled |

TOTAL: 1

TOTAL: \$23,700

AGENCY: OMRDD

A & C PAYROLL CODE: Youth Opportuniy Program

Name of Program: Central Office 5100

PART 3. ABOLISHED POSITIONS (WHICH WERE FUNDED
IN 1982-83 BUDGET)

| | | | |
|-----------------|-------|--------|--------|
| 1 Steno | 16155 | 13,009 | Filled |
| 1 Prog. Coord. | 16105 | 34,347 | Filled |
| 1 Assist Coord. | 16107 | 24,871 | Filled |
| 1 YOP Super. | 16110 | 23,466 | Filled |

Name of Program: Letchworth Village 51210

| | | | |
|--------------|----------|--------|--------|
| 2 YOP Super. | 90400-01 | 43,334 | Filled |
|--------------|----------|--------|--------|

Name of Program: Rome DC 51230

| | | | |
|--------------|-------|--------|--------|
| 1 YOP Super. | 90400 | 21,667 | Filled |
|--------------|-------|--------|--------|

Name of Program: SIDC 51270

| | | | |
|--------------|-------|--------|--------|
| 1 YOP Super. | 90400 | 21,667 | Filled |
|--------------|-------|--------|--------|

Name of Program: Brooklyn DC 51380

| | | | |
|--------------|-------|--------|--------|
| 1 YOP Super. | 90400 | 21,667 | Filled |
|--------------|-------|--------|--------|

Name of Program: O.D. Heck DC 51760

| | | | |
|--------------|-------|--------|--------|
| 1 YOP Super. | 90400 | 21,667 | Filled |
|--------------|-------|--------|--------|

Name of Program: Monroe DC 51780

| | | | |
|--------------|-------|--------|--------|
| 1 YOP Super. | 90400 | 21,667 | Filled |
|--------------|-------|--------|--------|

Name of Program: Broome DC 51940

| | | | |
|--------------|-------|--------|--------|
| 1 YOP Super. | 90400 | 21,667 | Vacant |
|--------------|-------|--------|--------|

| | |
|---------------------|------------------|
| TOTAL: 8 | TOTAL: \$269,029 |
| (7 filled 1 vacant) | |



91-775

FILED

JUN 25 1991

OFFICE OF THE CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

GEORGE KLEINMANN,

Petitioner,

v.

MARIO CUOMO, AS GOVERNOR OF THE
STATE OF NEW YORK, THE STATE OF NEW
YORK AND ARTHUR Y. WEBB, AS
COMMISSIONER OF THE NEW YORK STATE
OFFICE OF MENTAL RETARDATION AND
DEVELOPMENTAL DISABILITIES,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI
APPENDIX - VOLUME 2

MADELINE SHEILA GALVIN
Attorney for Petitioner
217 Delaware Avenue
Delmar, New York 12054
(518)439-7734

INDEX

PAGE

VOLUME I

JUDGMENTS, ORDERS AND DECISIONS

Judgment, United States District
Court, Northern District of New
York, Kleinman [sic] v. Cuomo, et al.,
Case #85-CV-519, Dated June 13, 1989
. A-1

Decision, United States District
Court, Northern District of New York,
Kleinman [sic] v. Cuomo, et al.,
85-CV-519, June 13, 1989 A-2

Summary Order, United States Court of
Appeals, Second Circuit, Kleinmann v.
Cuomo, et al., #89-7695, filed
January 18, 1990 A-15

Findings of Fact, Conclusions of Law,
U.S. District Court, Kleinman (sic.) v.
Cuomo, et al., 85-CV-519, Dated June 20,
1990 A-18

Summary Order, U.S. Court of Appeals,
Second Circuit, Kleinmann v. Cuomo, et
al., 89-7695, filed January 3, 1991
. A-30

Order, U.S. Court of Appeals, Second
Circuit, Kleinmann v. Cuomo, et al.,
Filed February 27, 1991 A-36

Summary Order (First Page Only) U.S.
Court of Appeals, Second Circuit,
Kleinmann v. Cuomo, et al., #89-7695,
Stamped Filed January 3, 1991, received
in office of Plaintiff-Appellant counsel
March 11, 1991 A-38

ADMINISTRATIVE DECISIONS, DETERMINATIONS
AND OPINIONS

Budget Bulletin, B-1076, February 9,
1983, Determination, Michael Finnerty,
Statewide Personnel Reduction Policy,
Plaintiff's Trial Exhibit 9. . . . A-41

OMRDD, New York State Office of Mental
Retardation and Developmental
Disabilities, Decision, Statement of
Abolished Positions, March 2, 1983,
Trial Exhibit 51. A-61

VOLUME II

Notice of Abolished Positions, Form BD-
98, Decision of Division of the Budget,
effective May 4, 1983, Trial Exhibit
69 A-132

OMRDD, State of New York Office of Mental
Retardation and Developmental
Disabilities, Grievance Decision, April
4, 1983A-136

OMRDD, State of New York Office of Mental
Retardation and Developmental
Disabilities, Second Step Decision,
Grievance, April 20, 1983
.A-163

Arbitor's Opinion and Award, Governor's
Office of Employee Relations, In the
Matter of Arbitration between Public
Employees Federation, AFL-CIO and State
of New York, OMRDD, (George Kleinmann)
File #83-05-598, dated May 16, 1984
.A-176

OMRDD, State of New York Office of Mental
Retardation and Developmental
Disabilities, Grievance Decision, dated
May 18, 1983 A-201

Step 3 Decision, State of New York
Governor's Office of Employee Relations,
In the Matter of Public Employees
Federation, AFL-CIO, George Kleinmann,
Grievant, against State of New York,
OMRDD, OER File No. 83-05-366,
Dated June 10, 1983 A-214

OMRDD, State of New York Office of Mental
Retardation and Developmental
Disabilities, Grievance, Second Step
Decision, June 30, 1983
. A-218

Step 3 Decision, State of New York
Governor's Office of Employee Relations,
In the Matter of Public Employees
Federation, AFL-CIO, George Kleinmann,
Grievant, against State of New York,
OMRDD, OER File No. 83-05-598, Dated
August 8, 1983 A-229

Equal Employment Opportunity Commission,
Arthur W. Stern, Deputy District
Director, Determination of Violation,
Charge No. 02840459, Dated _____,
Plaintiff's Exhibit 1A A-233

Letter of Violation, Equal Employment
Opportunity Commission, Arthur W. Stern,
Deputy District Director, Dated March 29,
1985 A-238

VOLUME III

| | |
|--|-------|
| New York State Department of Civil Service, Determination of February, 1983, Guidelines for the Administration of Reductions in Force in New York State Departments and Agencies | A-247 |
| Equal Opportunity Commission, Commission Report, Letter dated May 19, 1986, Ann Thacher Anderson, Senior Trial Attorney | A-356 |
| Equal Opportunity Commission, Freedom of Information Act Determination pursuant to 5 U.S.C. Sec. 552 (b)(5), October 19, 1987 | A-362 |

New York State Civil Service Law

Section 80A-365(1)

THE FOLLOWING ITEMS HAVE BEEN LODGED WITH
THE CLERK'S OFFICE

VOLUME IV

OTHER MATERIAL

Complaint, United States District Court,
Northern District of New York,

Kleinmann v. Cuomo, et al., dated

April 9, 1985A-366

Stipulation to Withdraw Appeal from
Active Consideration, United States Court
of Appeals, Second Circuit, Kleinmann v.

Cuomo, et al., So Ordered August 25,

1989, Docket No. 89-7695A-388

Notice of Reinstatement, United States
Court of Appeals, (Mistitled United
States District Court, Northern District
of New York), Second Circuit, Kleinmann
v. Cuomo, et al., filed October 1, 1990
. A-390

Rockwell Memo to Cuite, April 27, 1983,
Trial Exhibit, Plaintiff's Exhibit #152,
received in evidence 6/7/89A-393

CHARLES MICHAEL DEVANE, Trial Testimony
transcript pages 154-217
(Transcript Vol. II) A-395

GEORGE KLEINMANN, Trial Transcript,
Application for continuance to obtain
new Counsel (Denied on record),
transcript pages 2-13 (Transcript Vol.
III) A-499

PAGE

VOLUME V

LUCY KLEINMANN, Trial Transcript,
pages 13-25 (Transcript Vol III)
.A-518

Defense Motions at close of plaintiff's
case, transcript pages 25-47
(Transcript Vol. III) A-539

THOMAS CUIE, portions of Trial
Testimony, (Transcript Vol. III) . .A-575

VOLUME VI

THOMAS CUIE, portions of Trial Testimony
continued. A-642

Letter, Kleinmann to Rockwell, dated
April 7, 1983, claiming Computer
Programmer Job, Plaintiff's Trial Exhibit
#146 A-721

U.S. District Court, Northern District of
New York, Letter dated September 12, 1990
concerning Supplemental Index . . .A-724

Briefing Order, United States Court of
Appeals, Second Circuit, Kleinmann v.
Cuomo, et al., filed October 3, 1990
. A-735

United States Constitution,
Amendment 6A-737

United States Constitution,
Amendment 14 A-738

Federal Rules of Appellate Procedure,
Rule 35A-740

Federal Rules of Appellate Procedure,
Rule 40A-743

28 U.S.C. Section 455A-745

29 U.S.C. Section 621 et seq . . . A-753

29 U.S.C. Section 623A-756

29 U.S.C. Section 631A-759

42 U.S.C. Section 2000e, et seq . .A-760

Federal Rules of Civil Procedure 52(a)
.A-771

PLAINTIFF'S
EXHIBIT

69

A-132

EXECUTIVE DEPARTMENT
DIVISION OF THE BUDGET
STATE CAPITOL
ALBANY, 12224

HOWARD F. MILLER
DIRECTOR OF THE BUDGET
(Letterhead)

NOTICE OF ABOLISHED POSITIONS
(FORM BD-98)

OMRDD Personnel Office
OMRDD Finance Office
Dept. of Audit and Control, Payroll Audit
Dept. of Civil Service, Personnel Transactions
Dept. of Civil Service, Classification & Comp.

THIS IS TO NOTIFY YOU THAT THE FOLLOWING
POSITIONS ARE ABOLISHED AS OF THE EFFECTIVE DATE
NOTED BELOW. THE AFFECTED DEPARTMENT OR AGENCY
COULD TAKE IMMEDIATE STEPS TO INSURE THERE ARE
NO PAYMENTS OR ENCUMBRANCES AGAINST THESE
ABOLISHED POSITIONS AS OF THE EFFECTIVE DATE.

Dept: OMRDD Code: 51000

| <u>Item #</u> | <u>Title</u> | <u>SG</u> |
|---------------|-------------------------|-----------|
| 805 11801 | Deputy Commr. NYC Ops. | NS |
| 035 11326 | Consenst Decree Tech | G-25 |
| 605 11118 | Dir. of Volunteer Srvs | M-1 |
| 072 11455 | Sr. Bldg Constr. Eng. | G-24 |
| 510 11505 | Dep. Dir. Co. Serv. Gp. | M-VII |

| | | | |
|-----|-------|-------------------------|------|
| 525 | 11525 | Comm Resid & Place Spec | G-29 |
| 210 | 12208 | Office Servs. Mgr. | G-23 |
| 915 | 12810 | MH STaff DEv. Spec. IV | G-23 |

Page 2

| | | | |
|-----|-------|--------------------------|------|
| 920 | 12818 | Ag. Trng & Dev Spec I | G-18 |
| 240 | 10140 | Administrative Assist | G-18 |
| 202 | 90202 | Project Assnt. | G-18 |
| 630 | 11619 | Assnt Dir Cnty Sv Pl&Adm | M-V |

DIRECTOR OF THE BUDGET:

_____ DATE _____

cc: Budget Division Central Files

(_____, _____, and _____)

Drugs: 1000

P34 3431607

A-135

(OMRDD Letterhead)

STATE OF NEW YORK
OFFICE OF MENTAL RETARDATION AND
DEVELOPMENTAL DISABILITIES

Zygmund L. Slezak
Devane
Commissioner

Charles M.
Director
Human Resources

Management

CERTIFIED MAIL --- RRR

April-4, 1983

Mr. George Kleinman
749 New Scotland Avenue
Albany, New York 12208

Dear Mr. Kleinmann:

On March 18, 1983, a Second Step Review Meeting was conducted at 44 Holland Avenue on the contract grievance you have filed alleging violation of the preamble to the Bill of Rights, Article 2.2(e), Article 5, Article 6.3, and Article 36.2 of the Professional, Scientific, and Technical Services Unit Agreement.

STATEMENT OF FACTS

In June of 1982, a portion of The Division of Quality Assurance was moved from 44 Holland Avenue to a location on Russell Road. You were originally scheduled to move with that group. Because you saw your relationship with your immediate supervisor as less than satisfactory and the Russell Road location would cause some personal hardship, you sought to make alternative arrangements. With the assistance of the Personnel Office, an exchange of assignment with another employee was arranged. This arrangement was confirmed in a memorandum to you from Deputy Commissioner Norris dated June 28, 1982. About six months later, in a memorandum to you dated January 3, 1983, Mr. Cuite, the new Deputy Commissioner for Quality

Control, ordered the original reassignment to take place.

POSITION OF THE GRIEVANT

It is your position that the preamble of the Bill of Rights has been violated because your individual rights have not been maintained.

You contend that Article 2.2(e) has been violated because there was no "amicable discussion" before Mr. Cuite ordered your reassignment to go forward.

You believe that Article 5 has been violated by your immediate supervisor promising five different promotions at different times with none of these promises being fulfilled.

You indicated that Article 6.3 has been violated because your rights as an employee under the law have been

violated. You feel that the inclusion of your position in those to be abolished under the current layoff is a reprisal for exercising your rights under the grievance procedure.

You allege that Article 36.2 has been violated because, you contend, you have been discriminated against because of your age (57).

REMEDY SOUGHT

You seek to have your layoff notice rescinded and to remain at 44 Holland Avenue.

POSITION OF MANAGEMENT

The decision to reassign you and the decision to abolish your position were separate management decisions that were

made based upon the best utilization of the manpower resources available to the Division. Such decisions are a management right guaranteed by Article 5 of the agreement.

DISCUSSION

Article 9 of the Bill of Rights states:

"9. Disagreements arising as to the interpretation or application of the Bill of Rights shall not be specifically addressed under this Bill of Rights but must be grieved under the appropriate Article contained in the Agreement."

In light of the above language in the Bill of Rights itself, the Bill of Rights is not grievable. This aspect of your grievance, therefore, is denied as not grievable.

Article 2 of the agreement is the Statement of Policy and the Purpose of the agreement.

Article 2.2 states that one of the purposes of the agreement is:

"(e) To provide a basis for the adjustment of matters of mutual interest by means of amicable discussion".

That remains a purpose of the Collective Bargaining Agreement and has not been modified or abridged. Fulfillment of that goal can be found in both grievance procedures in which this matter is currently being dealt with. It was never intended for that contract language to require each and every management decision to be discussed with the union before implementation. In light of this, we must conclude that this contract

article has not been violated. This aspect of your grievance is denied on its merits.

Article 6.3 is part of Article 5, the "No Strikes" Article. You presented no evidence that the rights, remedies, or duties of PEF or employees under the State Law have been limited. Indeed, a strike was never even discussed. This contract article has not been violated. This aspect of your grievance, therefore is denied on its merits. In addition, any question of the appropriateness of your impending layoff is not properly before us in this grievance since you were notified of impending layoff long after this grievance was filed.

Article 36.2 states that "the State

agrees to continue its established policy against all form of illegal discrimination..." The State has not in any manner changed or discontinued its policy in this regard. The State's established policy continues to be against all forms of illegal discrimination.

The purpose of Article 36.2 is not to review individual claims of discrimination. The question of whether or not an individual has been subjected to a discriminatory act is not a matter for review by the grievance procedure. There ar other appropriate avenues of redress, such as the Affirmative Action Officer and the New York State Division of Human Rights. The purpose of Article 36.2 is to provide a protection to the

Union to assure that the State will not attempt to discontinue its established policy against all forms of illegal discrimination.

Inasmuch as the State has done that which it committed itself to do in Article 36.2, ie. has continued its policy against all forms of illegal discrimination, there has been no violation of Article 36.2. Even if this were not the case, you presented no evidence at all to demonstrate discrimination due to age. This aspect of your grievance is denied on its merits.

DECISION

Your grievance is denied in all of its aspects.

If this decision is found to be unsatisfactory, an appeal may be filed by PEF, through its President or his designee, with the Director of the Governor's Office of Employee Relations within 15 working days of the receipt of this decision. Any such appeal should be filed with:

Thomas Hartnett, Director
Governor's Office of Employee
Relations
Agency Building #2
Empire State Plaza
Albany, NY 12223

and shall include a copy of the grievance, a copy of all prior decisions and appeals, and a short plain written statement of the reasons for disagreement with this decision.

Very truly yours,

Sheldon S. Kramer
Director of Employee Relations

SSK/evs

cc: R. Rockwell
J. Sano
B. Babcock

A-145

ROUTING SLIP

U.S. GOVERNMENT PRINTING OFFICE: 1964 O - 348-000
 (GSA GEN. REG. NO. 27)
 (5010-108-01)

| | | | |
|-------------------------|-----------------|-------------------|--|
| TO | | DATE | |
| FIRST NAME | LAST NAME | DATE | |
| <i>George</i> | <i>Kleinman</i> | | |
| OR | | FURTHER (OR) DATE | |
| | | | |
| FACILITY NAME (OR) DATE | | | |

| | | | |
|------------|-----------|-------------------|--|
| FROM | | DATE | |
| FIRST NAME | LAST NAME | DATE | |
| | | | |
| | | FURTHER (OR) DATE | |
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|--|--|
| <input type="checkbox"/> AS REQUESTED <input type="checkbox"/> FOR YOUR COMMENTS <input type="checkbox"/> FOR YOUR APPROVAL <input type="checkbox"/> TAKE APPROPRIATE ACTION <input type="checkbox"/> CALL ME <input type="checkbox"/> SEE ME | DATE <i>4/6/83</i> <input type="checkbox"/> FOR YOUR INFORMATION <input type="checkbox"/> NOTE & RETURN <input type="checkbox"/> NOTE & FILE <input type="checkbox"/> FOR YOUR SIGNATURE <input type="checkbox"/> _____ |
| <i>This should have been attached to the 2nd slip in your previous filing.</i> | |
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A-146

BEST AVAILABLE COPY

STATE/PEF GRIEVANCE FORM
PROFESSIONAL SCIENTIFIC AND TECH SERVICES UNIT
(All grievances, decisions, and appeals
must be served personally or by
certified mail, return receipt req.).
TO BE COMPLETED BY GRIEVANT OR HIS
REPRESENTATIVE:

Name: George Kleinmann Title: Administrative Assist.

Department: OMRDD

Work Location: 44 Holland Avenue

Supervisor: Thomas Cuite

Type of Grievance:

— Contract Grievance
— Provision of State/PEF Agreement
alleged to have been violated:

X Non-Contract Grievance
(May be appealed only through Step 3)

STEP 1

(Note: Step 1 grievance must be submitted not more than 30 days after the date the act or omission giving rise to the grievance occurred.)

Date of Occurrence: January 3, 1983

Statement of Facts: (Use additional sheets if required) Was reassigned with only 1 full day's notice to a previous supervisor with whom I have had an extremely poor experience, and to a location which is a (over)

Remedy Sought: Agency to honor its commitment

and to keep grievant at 44 Holland Avenue

Date Submitted: January 4, 1983

Aggrieved Employee: /s/ George Kleinmann

CHECK TO MAKE SURE ALL REQUIRED INFORMATION HAS
BEEN PROVIDED AND GIVE THIS FORM TO YOUR
FACILITY OR INSTITUTION HEAD OR DESIGNEE.

1st Step Decision

Date Grievance Received: _____

Determination Attached.

Date Decision Issued: _____

* Note: Facility or Institution head or
designated representative shall meet with the
employee or PEF and shall issue a short, plain
written statement of reason for his decision to
the employee or PEF not later than twenty (20)
working days following the receipt of
grievance.

STEP 2 APPEAL

(NOTE: To be submitted with a copy of the Step
1 decision to the agency head or his

representative designated to receive such appeals within (10) working days* of receipt of Step 1 decision or date Step 1 decision ws due, whichever is earlier.)

The decision at Step 1 of the grievance described above is unsatisfactory.

Reasons for disagreement with Step 1 Decision:
(1) Step one decision not submitted timely; contractual violation. (2) I have right to assume non-compliance to my demand. (3) PLEASE REFER TO ATTACHMENT WHICH IS MADE PART OF THIS STEP 2 APPEAL FORM

Date Submitted: February 4, 1983

Aggrieved Employee: /s/ George Kleinmann

CONTINUATION OF STATEMENT OF FACTS AS CONTAINED
IN STEP 1

...hardship for me, and a location that I was promised I would not have to go to, as per an agreement with Mr. Norris, Mr. Contello and Mr. Rockwell based on letter of June 28, 1982 from Mr. Norris (attached). The abruptness, unfairness and lack of explanation is an additional insult to human dignity.

(OMRDD Letterhead)

STATE OF NEW YORK
OFFICE OF MENTAL RETARDATION AND
DEVELOPMENTAL DISABILITIES

Zygmund L. Slezak Charles M. Devane
Commissioner Director
 Human Resources Management

Date: March 10, 1983

Re: PEF Non Contract Grievance

Mr. George Kleinmann
749 New Scotland Avenue
Albany, New York 12208

Dear Mr. Kleinmann:

This will acknowledge receipt of the
above referenced grievance. In
accordance with the grievance procedure
you are now entitled to a review of your
grievance before a representative of the
Commissioner.

You grievance review meeting is scheduled
to be held:

At: 44 Holland Avenue, 3rd Floor
Commissioner's Conference Room

Date: March 18, 1983

Hour: 12:00

Before: Robert G. Babcock

A-151

In the event that unforeseen circumstances make it impossible to attend the meeting as scheduled, you and/or your representative are to request a postponement no less than 72 hours before the time and date set forth above. Unless there is mutual agreement to adjourn this review, it is expected that all parties will be ready to proceed on the date indicated.

Very truly yours,

Sheldon S. Kramer
Director of Employee Relations

nls

cc: Facility Personnel Director
Union Representative(s)
or
Employee's Attorney
Grievance File

OFFICE OF MENTAL RETARDATION AND
DEVELOPMENTAL DISABILITIES

INTRADEPARTMENTAL CORRESPONDENCE

TO: Mr. Kleinmann

FROM: Mr. Norris

DATE: June 28, 1982

SUBJECT: Reassignment

ADDITIONAL COPIES TO: Mr. Radzynski

It is my understanding that you have requested a reassignment. I have discussed your request with Mr. Radzynski who has proposed that you be assigned to the functions now being performed by Mr. Niles. Mr. Niles will be reassigned to perform those functions you are now performing.

I have no objection to this proposal and presuming the conditions are satisfactory to you, I suggest you work out a transition with Mr. Radzynski and

Mr. Niles.

If there are any problems, please
let me know.

(Date Stamped
Received July 1, 1982)

A-154

Attachment February 4, 1983

Events warrant change of grievance type
to Contract
Grievance, Contract Articles Cited.

1. Article 2.2.e.

Supervisor gave no explanation for transfer on January 3 or again on January 4, 1983; made no effort to discuss matter amicably; sat rigid and unresponsive during both meetings. Agency representatives have made no attempts at settlement; their numerous phone calls to home of grievant related entirely to physical examinations which they arranged by mail then canceled by phone. Supervisor's latest written order of January 27, 1983 is not compliant with request of grievant, and would result in further

embarrassment to grievant and co-workers.

2. Article 5.

The prerogative of an individual supervisor in deploying the work force cannot include overriding commitments made by a member of the agency management team senior to himself only shortly before the event grieved. Grievant's remaining at 44 Holland Avenue after departure of his former unit was the product of months of worrisome, unremitting effort and negotiation. Grievant requested assistance in transferring in January 1982. In February Mr. Kevin Travis, Deputy Commissioner of Quality Assurance, agreed to release item at the suggestion of Mr.

Raymond Rockwell, Director of Personnel, who then promised grievant that he would not have to leave 44 Holland Avenue. In June 1982 at suggestion of Mr. Robert Norris, First Deputy Commissioner, Grievant agreed to switch duties with another staff member making approximately twice the salary, in order to stay at 44 Holland. This arrangement once agreed to by all parties concerned, was approved by Mr. Joseph Costello and Mr. Raymond Rockwell, at a meeting with grievant on July 12, 1982. Grievant had worked under this arrangement for almost six months when it was abruptly overridden. Grievant demands that his rights in these circumstances be established through

the full grievance process including hearing if necessary.

3. Article 6.3

Nothing in this contract under which grievance is made, precludes grievant from pursuing any and all other options available under this and other laws. Proceedings in this grievance should enhance and correlate with any other actions.

4. Article 36.

In view of the intolerable oppression and discrimination evidenced by the transfer order of January 3, 1983, and of similar events occurring earlier, grievant retains option of filing complaints with appropriate state and federal offices; instant proceedings

including hearing if necessary
should conduce to this process.

For the above and other reasons I am
requesting that the type of grievance be
changed to Contract, and the matter
proceed in orderly stages through the
hearing if not settled by arrangement
allowing grievant to remain at 44 Holland
Avenue.

/s/ GEORGE KLEINMANN

Dated: Feb 4, 1983

STATE/PEF GRIEVANCE FORM
PROFESSIONAL SCIENTIFIC AND TECH SERVICES UNIT
(All grievances, decisions, and appeals
must be served personally or by
certified mail, return receipt req.).
TO BE COMPLETED BY GRIEVANT OR HIS
REPRESENTATIVE

Name: George Kleinmann

Title: Administrative Assistant

Department or Agency: OMRDD

Work Location: Albany

Supervisor: Thomas J. Cuite, Jr.

Type of Grievance:

X Contract Grievance
Provision of State/PEF Agreement
alleged to have been violated:

 Non-Contract Grievance

STEP 1

(NOTE: Step 1 grievance must be submitted not
more than 30 days after the date the act or
omission giving rise to the grievance occurred.)

Date of Occurrence: March 11, 1983

Statement of Facts: I was laid off in
retaliation for my having filed grievance.
Layoff was used as a solution to grievance.
Original grievance 1-4/83 2 pgs 3-23-83
attached.

Remedy Sought: Agency to honor its commitment to keep grievant at 44 Holland Ave at same salary grade bypassing layoff in view of medical testimony and facts on attachments

Date Submitted: March 23, 1983

Aggrieved Employee: /s/ George Kleinmann

1st Step Decision

Date Grievance Received: _____

Determination Attached.

Date Decision Issued: _____
Facility or Institutional Level Rep. _____

*NOTE: Facility or Institution head or designated representative shall meet with the employee or PEF and shall issue a short, plain written statement of reason for his decision to the employee or PEF not later than (20) working days following the receipt of grievance.

STEP 2 - APPEAL

(NOTE: To be submitted with a copy of the Step 1 decision to the agency head or his representative designated to receive such appeals within 10 working days* of receipt of

A-161

Step 1 decision or date Step 1 decision was due, whichever is earlier.)

The decision at Step 1 of the grievance described above is unsatisfactory.

Reasons for disagreement with Step 1 Decision:

See attachments I, II, III, IV, V. I - When layoff was finally conducted on May 4, 1983, I was one of only two persons out of entire layoff unit to be let go. the other 27 of the originally scheduled group of 29 to be laid off, were saved.

Date Submitted: May 26, 1983

Aggrieved Employee: /s/ George Kleinmann

(OMRDD Letterhead)

STATE OF NEW YORK
OFFICE OF MENTAL RETARDATION AND
DEVELOPMENTAL DISABILITIES

Zygmund L. Slezak
Devane
Commissioner

Charles M.
Director
Human Resources

CERTIFIED MAIL---RRR

April 20, 1983

Mr. George Kleinmann
749 New Scotland Avenue
Albany, NY 12208

Dear Mr. Kleinmann:

On March 18, 1983, a Second Step Review Meeting was conducted at 44 Holland Avenue on the non-contract grievance you originally filed on January 4, 1983, alleging unfair treatment in a reassignment.

STATEMENT OF FACTS

In June of 1982, a portion of The Division of Quality Assurance was moved from 44 Holland Avenue to a location on Russell Road. You were originally scheduled to move with that group. Because you saw your relationship with your immediate supervisor as less than satisfactory and the Russell Road location would cause some personal hardship, you sought to make alternative arrangements. With the assistance of the Personnel Office, an exchange of assignment with another employee was arranged. This arrangement was confirmed in a memorandum to you from Deputy Commissioner Norris dated June 28, 1982. About six months later, in a memorandum to you dated January 3, 1983, Mr. Cuite

the new Deputy Commissioner for Quality Control, ordered the original reassignment to take place.

DISCUSSION .

At the meeting, it became clear that additional information was needed from Messrs. Cuite and Norris regarding your reassignment. It was mutually agreed to hold this matter in abeyance for two weeks to permit time for the management representative to produce this information and for the union to respond to it.

During this hiatus, certain changes in the geographic location of programs took place. This removed the major impediment to your acceptance of your reassignment.

Indeed, subsequently, you have reported for duty at the Russell Road Location.

Page 2

DECISION

Your grievance is rendered moot.

If this decision is found to be unsatisfactory, an appeal may be filed by PEF through its President or his designee, with the Director of the Governor's Office of Employee Relations within 15 working days of the receipt of this decision. Any such appeal should be filed with:

Thomas Hartnett, Director
Governor's Office of Employee
Relations
Agency Building #2
Empire State Plaza
Albany, New York 12223

and shall include a copy of the grievance, a copy of all prior decisions and appeals, and a short plain written statement of the reasons for disagreement with this decision.

Very truly yours,

Sheldon S. Kramer
Director of Employee Relations

SSK /evs

cc: R. Rockwell
J. Sano
R. Babcock

STATE/PEF GRIEVANCE FORM
PROFESSIONAL, SCIENTIFIC AND TECHNICAL
SERVICES UNIT

TO BE COMPLETED BY GRIEVANT OR HIS
REPRESENTATIVE:

Name: George Kleinmann

Title: Administrative Asst

Department or Agency: OMRDD

Work Location: 44 Holland Ave., Albany

Supervisor: Thomas Cuite

Type of Grievance:

_____ Contract Grievance
Provision of State/PEF Agreement
alleged to have been violated:

Article: _____

Subsection: _____

X Non-Contract Grievance (May be
appealed only through Step Three)

STEP 1

(NOTE: Step 1 grievance must be submitted
not more than thirty (30) days after the
date the act or omission giving rise to

the grievance occurred.)

Date of Occurrence: January 3, 1983

Statement of Facts: Was reassigned with only 1 full day's notice, to a previous supervisor with whom I have had an extremely poor experience, and to a location which is a (over)

Remedy Sought: Agency to honor its commitment and to keep grievant at 44 Holland Avenue, Albany, N.Y.

Date Submitted: January 4, 1983

Aggrieved Employee: /s/ George Kleinmann

CHECK TO MAKE SURE ALL REQUIRED
INFORMATION HAS BEEN PROVIDED AND GIVE
THIS FORM TO YOUR FACILITY OR INSTITUTION
HEAD OR DESIGNEE.

1st Step Decision

Date Grievance
Received: _____

Determination Attached

Date Decision
Issued: _____

Facility or Institutional Level
Rep. _____

*NOTE: Facility or Institution head or designated representative shall meet with the employee or PEF and shall issue a short, plain written statement of reason for his decision to the employee or PEF not later than twenty (20) working days following the receipt of grievance.

STEP 2-APPEAL

(NOTE: To be submitted with a copy of the Step 1 decision to the agency head or his representative designated to receive such appeals within ten (10) working days* of receipt of Step 1 decision or date Step 1 decision was due, whichever is earlier.)

The decision at Step 1 of the grievance described above is unsatisfactory.

Reasons for disagreement with Step 1 decision: (1) Step One Decision not submitted timely; contractual violation. (2) I have right to assume non-compliance to my demand. (3) PLEASE REFER TO ATTACHMENT WHICH IS MADE PART OF THIS STEP 2 APPEAL FORM.

Date Submitted: February 4, 1983

Aggrieved Employee: /s/ George Kleinmann

STATE/PEF GRIEVANCE FORM

2nd STEP DECISION

Date Received: _____

Determination Attached

Date Decision Issued _____

Reviewer: _____

*NOTE: The agency or department head or his designee shall meet with the employee or PEF for a review of the grievance and shall issue a short written statement of reasons for his decision to the employee or PEF, as appropriate, no later than 20 working days following receipt of the Step 1 Appeal.

STEP 3 - APPEAL

(NOTE: Appeals to Step 3 may be submitted only by the President of PEF or his authorized designee, and must be submitted within 15 working days* of the grievant's receipt of the Step 2 decision.)

The decision at Step 2 of the grievance described is unsatisfactory.

Reasons for disagreement with Step 2
Decision _____

Date Submitted: _____

Aggrieved Employee: _____

Authorized Signature: _____

*NOTE: PEF must file this appeal within fifteen (15) days of receipt of Step 2 Decision or date Step 2 Decision was due, whichever is earlier, together with the grievance and the decisions at Step 1 and 2 with the Governor's Office of Employee Relations, Agency Building #2, 12th Floor, Empire State Plaza, Albany, NY, 12223.

3RD STEP DECISION

Case Number: _____
Date Received by the Governor's Office of
Employee
Relations: _____

Determination Attached

Date Decision
Issued: _____

Director of the Governor's Office of
Employee Relations or
Designee: _____

*NOTE: The Director of the Governor's
Office of Employee Relations, or his
designee, shall issue a short, plain
written statement of reasons for his

1
decision within 15 working days after receipt of the appeal.

STEP 4 - APPEAL

(NOTE: Appeals to Arbitration may be submitted only by the President of PEF or his designee, and must be submitted to the Governor's Office of Employee Relations within 15 working days of receipt of the Step 3 decision.)

The Public Employees Federation hereby demands ARBITRATION.

Date Submitted: _____
Authorized Signature _____

*In the case of a department or agency which normally operates on a 7-day a week basis, the reference to 10 working days shall mean 14 calendar days and 15 working days shall mean 21 calendar days and 20 working days shall mean 28 calendar days. All time limits contained in this Article may be extended by mutual agreement. Extensions shall be confirmed in writing by the party requesting them.

This page of the appendix contains a proof of receipt of certified mail. It cannot be reproduced here without use of photoreduction.

State of New York
Office of Mental Retardation and
Developmental Disabilities
44 Holland Avenue
Albany, New York 12229

CERTIFIED MAIL--RRR

Mr. George Kleinmann
749 New Scotland Avenue
Albany, NY 12208

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

CLAIM CHECK
NO.
411468

☐ CASH
☐ C.O.D.

DATE
4/22/83
POST OFFICE

2ND NOTICE

RETURN

Detached from
PS Form 3848-A
May 1979

A-175

BEST AVAILABLE COPY

GOVERNORS OFFICE OF EMPLOYEE RELATIONS
File No. 83-05-598

(Stamped received 6/7/84 OMRDD
Personnel Office)

- - - - -
IN THE MATTER OF THE ARBITRATION

-between-

ARBITRATORS
OPINION &
AWARD

Public Employees Federation, AFL-CIO

-and-

(Stamped
received
5/30/84
Employee
Relations)

STATE OF NEW YORK (OFFICE OF MENTAL
RETARDATION AND DEVELOPMENTAL
DISABILITIES - CENTRAL OFFICE)

RF: George Kleinmann
- - - - -

APPEARANCES

For the Public Employees Federation, AFL-CIO: John Ryan, Field Representative; Linda Stanczik, Director of Field Services; George Kleinman, Grievant; Richard Burstein, Roemer & Featherstonhaugh, Counsel to Grievant; Ted Ricket, Co-Leader; Miles Cavanaugh, Field Representative

For the State of New York (Office of Mental Retardation and Developmental Disabilities - Central Office):
Susan G. Whiteley, Assistant Counsel;
Raymond E. Rockwell, Assistant Director of Personnel; Robert G. Bentley, Deputy Director of Employee Relations; Sheldon S. Kramer, Director of Employee Relations; Robert J. Foody, Assistant Counsel; Sue R. VanBuren, Senior Personnel Administrator; Bill Strait

Before: Edward Levin, Arbitrator

Issue: Did the State of New-York (Office of Mental Retardation and Developmental Disabilities) violate Article 36.2 of the 1982-85 Agreement between the State and PEF on March 11, 1983?

If so, what, consistent with the Agreement, shall the remedy be?

CONTRACT LANGUAGE

ARTICLE 36.2

The State agrees to continue its established policy against all forms of illegal discrimination with regard to race, creed, color, national origin, sex, age, or handicap, or the proper exercise

by an employee of the rights guaranteed by the Public Employees Fair Employment Act.

UNION POSITION

The grievance involves George Kleinman, a member of the bargaining unit, age 57, with twenty years of satisfactory service with the State who filed a grievance protesting his reassignment on January 3, 1983 to another building because of its adverse impact on his health. At the time he filed the grievance Mr. Kleinman was employed by the State in the Office of Mental Retardation and Developmental Disabilities (OMRDD) as an Administrative Assistant, Grade 18. After filing the grievance Mr. Kleinman went on sick leave

to avoid the damaging impact that the reassignment might have. On January 14, 1983, Mr. Kleinman received a letter from Raymond E. Rockwell, Assistant Director of Personnel, directing him to report to the Employee's Health Service for an examination. After some scheduling problems were ironed out, Mr. Kleinman was examined by Dr. Hargraves on February 24, 1983 and was told that he would have to have another examination with a consulting physician and was sent to Dr. Steinhart on March 9, 1983. In a letter dated March 23, 1983, Dr. Hargrove wrote Mr. Rockwell advising him that both doctors advised that Mr. Kleinman not be placed in his current work assignment.

On March 11, 1983, while Mr. Kleinman was still on sick leave Mr. Sheldon Krammer, Director of Labor

Relations for OMRDD, called Mr. Kleinman to inform him that there would be a grievance hearing on March 18, 1983 and that he would receive a notice to that effect in the mail. That notice never arrived but the following day Mr. Kleinman received a lay-off notice from Mr. Zygmund Slezak, the Commissioner.

The Union contends that of the 29 PS&T unit members who received lay-off notices on that day, two worked for the Albany Central Office. Of those two, one was Mr. Kleinman and the other was someone who refused to bump or retreat to a lower grade. The Union points out that most of the other employees in the PS&T unit who were layed-off were maintained in positions by methods that were available to the OMRDD with respect to

Mr. Kleinman. In contrast, Ms. Ronnie Raines, an MR Program Planner I, Grade 18 who was a Provisional Employee scheduled for lay-off on May 4, 1983, was retained while Mr. Kleinman was not. The Union believes that this serves as proof that the lay-off was used as a pretext to get rid of Mr. Kleinman because of his age and in retaliation for his opposition to reassignment. The Union reasons that if they were not intending to discriminate against Mr. Kleinman, why did they retain a "provisional employee and lay off a twenty year employee with veteran status at approximately the same employment and salary level?

The Union believes that it has established a prima facie case of discrimination having shown that Mr.

Kleinman, a Protected Class employee, age 57, was laid off in violation of Civil Service Law while a younger provisional employee in a job and salary level similar to his was retained. The Union maintains that his qualifications to take another job is moot since he should not have been forced out of his original position while a younger provisional was retained.

The Union points out that Mr. Kleinman is now on the State's payroll earning \$5,140, less than he received when he was laid-off. In addition, his travail has effected his health. The Union asks that the grievance be therefore granted and the grievant be made whole to the date of his lay-off.

STATE POSITION

The State points out that it made many accommodations to Mr. Kleinman's needs during the period between February, 1982 and January, 1983, when Mr. Kleinman was transferred to another location that was unacceptable to him. For a period of three months after being notified of his transfer he absented himself from work claiming that working with his new supervisor would make him ill. On January 14, 1983, Mr. Kleinman was notified that because of his absence from work and his failure to provide a doctor's note, a medical examination was arranged with the Employee Health Service (EHS) to determine his health status and work capabilities. Although Mr. Kleinman reported for his EHS medical examination,

he did not complete it and stated that he would consult his own physician before filling out EHS forms. Subsequently, he brought in a note from his own physician which the State found non-specific and inadequate. However, because a new work arrangement that might be satisfactory to Mr. Kleinman was being worked out, a new physical examination was not rescheduled. On January 27, 1983 the grievant was informed of a new arrangement that addressed his complaint about working with a specific supervisor, but he still did not report to work and continued on sick leave. On February 24, 1983 he was once again required to report to EHS for an examination.

In the meantime, because of a budgetary emergency, it became necessary

for the OMRDD to reduce its work force and plans were developed to accomplish this goal in a way that would not impair the functions of the agency's bureaus. One of the targeted positions was that of Administrative Assistant, Grade 18. As a result all individuals in that position, including the grievant, were notified on March 11, 1983 of the scheduled lay-offs unless they exercised bumping or retreatment rights.

On March 23, the EHS issued a report stating that it would not be appropriate to place Mr. Kleinman in his current work assignment. This report was issued by EHS without knowledge of the events that transpired from the time between Mr. Kleinman's medical examination and their report.

After the March notice of lay-off, Mr. Kleinman met with Mr. Rockwell and discussed his retreat option consisting of a position as a Grade 14, Computer Programmer, a job he previously held. Mr. Kleinman accepted the option but subsequently notified his prospective supervisor that he would not accept the position. According to the State he was asked to make his declination formal, but he never did so and the position was subsequently filled by another laid-off employee.

On March 30, 1983, in response to a request by the grievant, the Civil Service Department informed him that the only position available to him based on his retreatment, bumping or lateral rights was the Grade 14 Computer Program

position. However, on April 1, 1983 a letter went out to Mr. Kleinman informing him that the layoff was postponed until the close of business on May 4, 1982. On April 7, 1983, Mr. Kleinman sent a letter to Mr. Rockwell advising him that he was claiming the Computer Programmer job that was offered to him earlier, but was informed in a letter dated April 12, 1983 that since he did not respond in a timely way to the offer of that position, the option was foreclosed and was no longer available to him. On May 4, 1983 Mr. Kleinman was laid off as previously informed and shortly afterwards was rehired as a Purchasing Agent with the State Office of General Services.

The State denies any allegation of illegal age discrimination. The Federal

test for age discrimination derived from various court cases requires that the plaintiff must show that (1) he is within the protected age group and that he had been adversely affected - discharged or demoted by the employer's decision; (2) show that he was qualified to assume another position at the time of discharge or demotion; and (3) produce evidence, circumstantial or direct, from which a fact-finder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue. With respect to the third test, while the court requires an employer not to discriminate, it does not require special treatment of the "protected" employee. Therefore the plaintiff is required to show that the employer did

not treat age neutrally and lead the fact-finder to conclude that the employer either consciously refused to consider retaining or relocating a plaintiff because of age, or regarded age as a negative factor in such consideration.

While Mr. Kleinman has shown that he meets the criteria for the protected age group, he has failed to show that he qualified for any of the positions that he applied for or produce evidence, circumstantial or direct, that OMRDD intended to discriminate against him because of age. The only attempt to show discrimination was the claim of disparate treatment regarding a Ms. Bonnie Raines, a Provisional Programmer at his level who was not laid off. Besides not producing any evidence concerning Ms. Raines age,

the OMRDD showed that this employee held a different job title than Mr. Kleinman, was in another program which was funded from a different source, and was not subject to displacement. Thus the Union failed to present a prima facie case of discrimination nor did it show any change of established State policy in this regard. Therefore, there is no proof that Article 36, Section 2 of the Agreement was violated with regard to its prohibition concerning discrimination.

The State maintains that in order to prove that Mr. Kleinman was discriminated against because of union activity, the burden is on him to show that but for the protected activity of filing a grievance he would not have been laid off. The State points out that the grievant never

produced a copy of the grievance that he alleged he filed on or about January 3, 1984 or the exact nature of the grievance. Nor did he show a connection between the alleged grievance and the events that resulted in his diminished job assignment. In addition, there is no showing that the individual making the layoff decision even had knowledge of a grievance. Mr. Kleinman failed to show any discriminatory connection between his layoff and any protected union activity and the charge of discrimination for engaging in protected union activity must be rejected.

The facts show that management made numerous attempts to assist the grievant in making job adjustments to meet some of his job related problems. He was also

assisted by management in finding a retreat option that he could move to after his layoff. However, based on his failure to exercise this option in a timely manner and several unsuccessful attempts to get him to inform supervision of his decision, the job was assigned to another laid off employee.

The State therefore asks, based on Mr. Klainman's failure to show evidence of age discrimination or Taylor Law violation, that the grievance be dismissed.

ARBITRATOR'S OPINION

In order for this grievance to be sustained the Union must carry the burden of showing that the State failed to continue its policy against all forms of

illegal discrimination, and particularly age discrimination with respect to the grievant, and/or show that the State discriminated against Mr. Kleinman in relation to his Taylor Act rights.

With respect to the charge of age discrimination the main evidence introduced by the Union in support of this contention is that Mr. Kleinman was laid off while a younger provisional employee in the same grade as Mr. Kleinman was retained. The Union maintains that this comprises an illegal act of discrimination by the State since it chose to retain a younger provisional employee over Mr. Kleinman, a Protected Class employee with superior right. The Arbitrator does not find that this fact in and of itself constitutes a prima

facie case of discrimination. It could merely indicate that the agency did or did not follow Civil Service rules for any number of reasons other than discrimination. There is no evidence, circumstantial or otherwise, that would lead the Arbitrator to conclude that the employer reached his decision to lay off Mr. Kleinman only after considering the factor of age, or that he did not treat age neutrally in reaching his decision. Whether or not the State properly laid off Mr. Kleinman in accordance with Civil Service policy and procedure is not involved in this arbitration and therefore need not be considered here. Suffice it to say that a single event of the misapplication of Civil Service policies and procedures, even if proven,

would not be enough to show that the decision was based on age prejudice. Nor did the Union successfully contradict the State's allegations that Ms. Raines did not hold the same job title, was funded from a different source, and therefore was not subject to displacement as a result of lay-offs. Nor has the Union shown any proof, other than their assertion to that effect, that Ms. Raines was younger than Mr. Kleinman, or that her age was taken into consideration in deciding to keep her instead of Mr. Kleinman.

The evidence relied upon by the Union in proving its charge of retaliation for filing a grievance consists of the allegation that the State tried to get rid of the grievant by

reassigning him to another building. When he went on sick leave in response to this move by the State, they attempted to force him out by sending him to involuntary medical examinations. When the medical examinations resulted in recommendations from the two examining physicians that the grievant should not be reassigned, they abolished his job. The Union acknowledges the State's right to assign, transfer and to make certain personnel determinations but finds its actions with regard to the grievant as constituting retaliation for filing a grievance. However, while showing that many unusual events happened to the grievant during the period in question, the necessary link between these events and the fact that Mr. Kleinman filed a

grievance is not established. Indeed, there was no copy of the grievance introduced as evidence. The Arbitrator does not find it unusual for an employer to order an employee to undergo a physical examination when the employee takes sick leave rather than report to his assignment. There is no showing that this action on the part of the State was for improper purposes, discriminatory or even harassment. As a matter of fact, the medical examination recommended that the grievant not be transferred. The budgetary crisis and the dislocation it produced during this time period effected many employees, including the grievant, but was a chance event that coincided with the other incidents involved in this grievance. The Union has failed to

demonstrate that any of the job movements that took place at that time resulted from anything but a response to the requirements placed on the agency by the State to reduce staff and budget. The one possible exception is the case of a provisional employee at the grievant's job grade who the Union alleges was retained while Mr. Kleinman, a permanent employee, was laid off and then offered a lower grade position. However, in this instance the Union has not established that the State in retaining the provisional employee by reason of her being employed in another program funded from a different source was improper.

The Arbitrator is not unsympathetic to the situation that Mr. Kleinman now finds himself in after many years of

service to the State. However, in order to find a contractual violation, a clear factual pattern supported by evidence must be established and presented to the Arbitrator. While there are many events that one may conjecture or speculate about there is insufficient proof, circumstantial or otherwise, to support the Union's contention that the State has changed its policy with respect to illegal discrimination with regard to age or the proper exercise of Taylor Law rights in this case, or that the grievant was improperly dealt with with respect to the prohibitions against discrimination for age or union activities.

Accordingly, the grievance is denied.

AWARD

1. The State of New York (Office of Mental Retardation and Developmental Disabilities - Central Office) did not violate Article 36.2 of the 1982-85 Agreement between the State and PEF on March 11, 1983.
2. The grievance is denied.

Date: May 16, 1984

Edward Levin
Arbitrator

STATE OF NEW YORK

SS:

COUNTY OF NEW YORK

Appeared before me this 16th day of May, 1984, EDWARD LEVIN, to me known, who did swear and affirm that he has executed the above and that all statements herein are true and correct to the best of his knowledge and belief.

Notary Public

(OMRDD Letterhead)

May 18, 1983

Mr. George Kleinmann
749 New Scotland Avenue
Albany, New York 12208

REGISTERED MAIL
RETURN RECEIPT REQUESTED

Dear Mr. Kleinmann:

On May 13, 1983 a First Step Review meeting was conducted at 44 Holland Avenue on the Contract grievance you filed alleging violation of provisions of the Professional, Scientific and Technical Service Unit Agreement. Members of the Public Employees Federation presented your grievance. They stated that the contract provision that you allege has been violated is Article 34.2(b) of the Professional,

Scientific and Technical Services Unit Agreement.

STATEMENT OF FACTS

On January 3, 1983 you were reassigned from 44 Holland Avenue to 30 Russell Road by Mr. Thomas Cuite, Deputy Commissioner for Quality Assurance. On January 4, 1983 you filed a grievance in response to that reassignment. You were also examined by the Employee Health Services on several occasions because you indicated that you were ill and unable to report to work at 30 Russell Road. Those visits occurred on January 19, 1983, February 24, 1983 and March 9, 1983. You were then sent a letter from the Commissioner dated March 11, 1983 laying you off effective close of business, April 7, 1983. That date was

subsequently postponed until close of business, May 4, 1983.

POSITION OF THE GRIEVANT

It is your position that, due to your age you were laid off in violation of Article 34.2(b).

It is also your position that once you were examined by the Employee Health Service on May 9, 1983 that OMR/DD received information from the physician who examined you and because of the information from the Employee Health Service, OMR/DD then decided to lay you off and sent to you a layoff letter dated March 11, 1983.

REMEDY SOUGHT

To rescind your layoff notice and to return your work assignment to 44 Holland Avenue, in doing so to restore all rights

and benefits as if you had not been laid off.

POSITION OF MANAGEMENT

The decision to lay you off was not related to either your age or to the findings from the Employee Health Service Physician. It was rather a decision based on a mandate to reduce the number of positions in the Quality Assurance Division and to do it in an equitable manner within the Division and to do so with as little disruption of the Division's programs as possible. The Commissioner of OMR/DD was notified during the last week of January that there could be a need for substantial layoffs in the OMR/DD Central Office. He testified his Deputy Commissioners to prepare layoff recommendations during the

first week of February, 1983. During that week the Deputy Commissioner for Quality Assurance recommended layoffs to accommodate his position fill level and the dollar savings that were needed. He looked at the number of Administrative Assistants within the Division of which there were two, one assigned to him and the other to the Bureau of Certification Control. There were four bureaus in the Division and the other three bureau heads had previously requested Administrative Assistants; a request that the Deputy Commissioner was not able to grant. Organizationally, he deemed it best to keep one position that of Senior Administrative Assistant for himself and to lay the Administrative Assistant, G-18 off.

DISCUSSION

Article 36.2 states that "the State agrees to continue its established policy against all forms of illegal discrimination...". The State has not in any manner changed or discontinued its policy in this regard. The State's established policy continues to be against all forms of illegal discrimination.

The purpose of Article 36.2 is not to review individual claims of discrimination. The question of whether or not an individual has been subjected to a discriminatory act is not a matter for review by the grievance procedures. There are other appropriate avenues of redress, such as the Affirmative action

Officer and the New York State Division of Human Rights. The purpose of Article 36.2 is to provide a protection of Human Rights. The purpose of Article 36.2 is to provide a protection to the Union to assure that the State will not attempt to discontinue its established policy against all forms of illegal discrimination.

Inasmuch as the State has done that which it has committed itself to do in Article 36.2, i.e., has continued its policy against all forms of illegal discrimination, there has been no violation of Article 36.2. Even if this were not the case, you presented no evidence at all to demonstrate discrimination due to age. This aspect of your grievance is denied on its

merits.

The agency had requested that you be evaluated by an Employee Health Service Physician to determine your ability to perform the functions fo your position as you indicated that you were ill and not able to work at 30 Russell Road. You visited the Employee Health Service but were not evaluated on January 19, 1983. You were instead waiting for a statement from your own physician.

You were again scheduled for an evaluation by the Employee Health Service on February 24, 1983. The physician who examined you on that date said that he would not be able to give us an accurate evaluation without first having an evaluation by a consultant that works for the Employee Health Service on an

occasional basis. That scheduled examination was for March 9, 1983.

We received a letter from the Employee Health Service on March 15, 1983 stating that "I examined Mr. George Kleinmann, an Administrative Assistant, at the Employee Health Service on March 14, 1983.

It is the combined opinion of myself and my consultant that it would be appropriate for continued productivity not to place Mr. Kleinmann in his current work assignment."

You have contended that you were not examined by the Employee Health Services on March 14, 1983 and that OMR/DD did know of the consultant's and the physician's findings between March 9 and March 11, 1983 and that as a result of

those findings your name was added to the layoff list.

We received information from the Employee Health Service Physician concerning your ability to work only after they received information from the consultant which was on March 14, 1983. Prior to March 14, 1983, the Employee Health Service was not aware of the consultant's findings. We were not aware of their combined findings until we received the letter from the Employee Health Service dated March 15, 1983. The information that was presented by management describing the layoff plan and procedures and the information from the Employee Health Service concerning your visits and the date that they received the consultant's report do not

substantiate the allegations and these aspects of your grievance are denied.

DECISION

Your grievance is denied in all of its aspects. The Article 34.2(b) violation that you allege is denied due to previous decisions based on alleged violations presented in other contract grievances. In addition, the other allegations that you make are not substantiated on the facts presented. The decision to lay you off was based on programmatic needs and was done in accordance with established layoff procedures. No data was presented to substantiate the allegation that the decision to lay you off is due to your age.

If this decision is found to be unsatisfactory, an appeal may be filed by you or filed by PEF, through its President or his designee, with the Director of the OMR/DD's Office of Employee Relations within 10 working day~ of the receipt of the receipt of this decision. Any such appeal should be filed with:

Mr. Sheldon Kramer
Director of OMR/DD Employee
Relations
44 Holland Avenue
Albany, New York 12229

and shall include a copy of the grievance, a copy of all prior decisions and appeals, and a short plain written statement of the reasons for disagreement

with this decision.

Very truly yours,

/s/ Raymond E. Rockwell

Raymond E. Rockwell

Assistant Director of

Personnel

RER/pem

STATE OF NEW YORK
GOVERNOR'S OFFICE OF EMPLOYEE RELATIONS

In the Matter of

PUBLIC EMPLOYEES FEDERATION, AFL-CIO,
(George Kleinmann),
Grievant,

-and-

Professional,
Scientific &
Technical Svs
Unit

STATE OF NEW YORK (Office of
Mental Retardation and Developmental
Disabilities, Central Office

Employer.

Step 3
Decision
OER File:
83-05-366

Subject:
Assignment

(Non-Contract Grievance)

On January 4, 1983 this grievance
was presented at Step 1 of the grievance
procedure established in the 1982-85
Agreement between the Executive Branch of
the State of New York and the Public

Employees Federation, AFL-CIO for the Professional, Scientific and Technical Services Unit. Following denials of the grievance at the earlier steps, an appeal was submitted to the Director of the Governor's Office of Employee Relations on April 25, 1983. James D. Brown was designated by the Director as his representative. This Step 3 determination is based on a review of the record.

On January 3 grievant was informed that his position would be reassigned from 44 Holland Avenue to a location on Russell Road. This grievance contends that such reassignment violates an agreement made between grievant and management in June, 1982 under which grievant's position would remain at Holland Avenue, and that the reassignment

is therefore unfair and improper.

The agency position is that the position was intended to be reassigned in June of 1982; that an accommodation was made to grievant at that time because of previous unsatisfactory relationships existing between grievant and the person who would be his supervisor at the Russell Road location; that program needs would be more adequately met if the position were reassigned. Further, in order to continue to meet grievant's major objection to the earlier reassignment, the supervisor at the Russell Road location was reassigned out of that location at the time grievant was reassigned to that location.

The agency has not been unfair or improper in these actions. It has

attempted to meet its programmatic needs through the reassignment of grievant's position, but at the same time has, through the reassignment of the supervisor, made reasonable efforts to accommodate grievant's major objection to the reassignment. The grievance is denied.

Thomas F. Hartnett
Director

By James D. Brown
Assistant Director

Dated: June 10, 1983
Albany, New York

(OMRDD letterhead)

June 30, 1983

Mr. George Kleinmann
749 New Scotland Avenue
Albany, New York 12208

Re: Contract Grievance
Article 36.2
Submitted: April 12, 1983

Dear Mr. Kleinmann:

A Second Step Review Meeting was held at
Central Office on June 10, 1983,
concerning your grievance cited above.
Present at the meeting in addition to
yourself were:

For the PEF:

John Ryan, PEF Field Representative
Ted Ricket, PEF Council Leader
Charles Eysaman, PEF Shop Steward

For the Central Office:

Raymond Rockwell, Assistant Director of
Personnel

Sue VanBuren, Senior Personnel
Administrator

Thomas Cuite, Deputy Commissioner for
Quality Assurance

For the OMRDD/Employee Relations Office:

Barbara E. Roberts, Agency Labor
Relations Representative

STATEMENT OF FACTS

- At the time of this grievance,
grievant was an Administrative
Assistant, 57 years of age.
- On January 3, 1983, grievant was
reassigned from 44 Holland Avenue to
30 Russell Road by Mr. Thomas Cuite,
Deputy Commissioner for Quality
Assurance.

- Grievant was examined by the Employee Health Services on January 19, 1983, February 24, 1983, and March 9, 1983, as he indicated he was unable to work at 30 Russell Road due to illness.
- Grievant was laid off from the position of Administrative Assistant, Grade 18, effective close of business May 4, 1983.

ISSUE

Did the management of OMRDD violate Article 36.2 of the PS&T Agreement by the grievant's lay off effective May 4, 1983?

REMEDY SOUGHT

For management to rescind the layoff notice and to return grievant to prior

work assignment at 44 Holland Avenue with restoration of all rights and benefits as if grievant had not been laid off.

POSITION OF PEF

The union contends that the grievant's lay off violated the age discrimination provisions of Article 36.2 of the PS&T Unit Agreement.

The union further stated that the grievant, once laid off from the title of Administrative Assistant, became eligible for appointment to approximately 88 other "comparable titles", yet management had failed to provide the grievant with another option for employment at 44 Holland Avenue.

1

The grievant provided the Agency Level Reviewer with a brief history of his employment with OMRDD and finalized his comments by stating that his lay off was due to his age and as far as he knew he was the only one who actually "hit the street" as a result of the May 4, 1983, OMRDD lay off.

POSITION OF MANAGEMENT

Management stated that the decision to lay off the grievant was not related to either age or to the findings from the Employee Health Service physician. They reiterated management's position as stated in the Step 1 level decision and produced a copy of a Step 3 decision rendered by James Brown, Assistant Director of the Governor's Office of

Employee Relations, OER File No. 81-05-190. This decision addressed the Governor's Office of Employee Relations interpretation of the "No Discrimination" Article in the PS&T contract and states "the purpose of this Article is not to review individual claims of discrimination." -

Therefore management stated that a grievance hearing is not the appropriate forum for a complaint of discrimination. Additionally, management stated that the union did not present documentation or evidence of any sort to demonstrate that the grievant was a victim of age discrimination.

Management further stated the procedures followed in the decision-making to effect

a reduction in force in the Quality Assurance Division. Lay off recommendations were made by the Deputy Commissioner for Quality Assurance during the first week of February 1983. There were two Administrative Assistants within the Division, one assigned to the Deputy Commissioner for Quality Assurance and the other to the Bureau of Certification Control. Three of the four bureaus did not have the position of Administrative Assistant.

Therefore, subsequent to a review of all programs, a decision was made by the Deputy commissioner of Quality Assurance to retain the position of Senior Administrative Assistant for himself and to eliminate the Administrative

Assistant, G-1 8 position encumbered by the grievant.

In response to the grievant's eligibility for a number of other "comparable titles", it is the responsibility of the New York State Department of Civil Service, and not the agency, to make comparability determinations in connection with the certification of preferred lists.

DISCUSSION

Article 36-2 of the Professional, Scientific and Technical Unit states "The State agrees to continue its established policy against all forms of illegal discrimination with regard to race, creed, color, national origin, sex, age

or handicap, or the proper exercise by an employee of the rights guaranteed by the Public Employees Fair Employment Act." The Governor's Office of Employee Relations has ruled in a Step 3 decision dated March 26, 1983 (copy attached), that the purpose of the "No Discrimination" article of the PS&T Agreement is not to review individual claims of discrimination. "The question of whether or not an individual has been subjected to a discriminatory act is not a matter for review by the grievance procedure." The appropriate entities to address an allegation of age discrimination include the New York State Division of Human Rights, the Agency's Human Rights Council, and/or Affirmative Action Office, and the New York State

Civil Service Commission.

Based upon a thorough review of the entire record, facts and documents presented, I can find no violation of Article 36.2.

DECISION

Your grievance is denied in all of its aspects based upon a review of the facts presented at the Agency Level Review Meeting.

If this decision is found to be unsatisfactory, an appeal may be filed by PEF, through its President or his designee, with the Director of the Governor's Office of Employee relations within 15 working days of the receipt of

this decision. Any such appeal should be
filed with:

Thomas F. Hartnett, Director
Governor's Office of Employee Relations
Agency Building #2
Empire State Plaza
Albany, New York 12223

and shall include a copy of the -
grievance, a copy of all prior decisions
and appeals and a short, plain written
statement of the reasons for disagreement
with this decision.

Very truly yours,

Sheldon S. Kramer
Director
Employee Relations

BER/mrc

cc: Raymond Rockwell
John Ryan
Ted Ricket
- Barbara E. Roberts

STATE OF NEW YORK
GOVERNOR'S OFFICE OF EMPLOYEE RELATIONS

In the Matter of Professional,
PUBLIC EMPLOYEES Scientific
FEDERATION, and Technical
AFL-CIO, Svs Unit
(George Kleinmann),

Grievant Step 3 Decision

-and-

OER File:
83-05-598

STATE OF NEW YORK (Office
of Mental Retardation
& Developmental
Disabilities,
Central Office),

Subject:
- No
Discrimination

Employer.

On March 23, 1983, this grievance was presented at Step 1 of the grievance procedure established in the 1982-85 Agreement between the Executive Branch of the State of New York and the Public Employees Federation, AFL-CIO for the

Professional, Scientific and Technical Services Unit. Following denials of the grievance at the earlier steps, an appeal was submitted to the Director of the Governor's office of Employee Relations on July 7, 1983. James D. Brown was designated by the Director as his representative. This Step 3 determination is based on a review of the record.

Grievant's permanent position of Administrative Assistant was abolished and his employment was terminated. This grievance contends that his position was selected for abolishment solely because of his age and in retaliation for his having previously filed a grievance, and thus constitutes a violation of Article 36, Section 36.2.

Section 36.2 provides that "The

State agrees to continue its established policy against all forms of illegal discrimination with regard to...age or...the proper exercise by an employee of the rights guaranteed by the Public Employees' Fair Employment Act."

While it is true that grievant's position was abolished and that he was laid off, that he had earlier filed a grievance, and that he no doubt is older than at least some of the employees of OMRDD (his age is not reported in any of the documents in the record), he has failed to establish that there is a cause and effect relationship between any of these facts. In the absence of the establishment of any causal relationship between his age and/or his having filed a grievance and his subsequent termination,

there can be no finding of a violation of
Article 36.

The grievance is therefore denied.

Thomas F. Hartnett
Director

By: /s/ James D. Brown
James D. Brown
Assistant Director

Dated: August 8, 1983
Albany, New York



Plaintiff's
Exhibit

1A

A-233

Charge No: 023840459

Edward Kleinman
749 Scotland Avenue
Albany, New York 12208 Charging Party

Office of Mental Retardation and
Developmental Disabilities
44 Holland Avenue
Albany, New York 12229 Respondent

All title VII jurisdictional requirements and Age Discrimination in Employment Act have been met. Charging Party alleged that he was discriminated against in violation of Title VII of the Civil Rights Act of 1964, as amended by being retaliated against for having filed several grievances and complaints against the Respondent and finally was terminated. He also alleged that the

above actions were in violation of the Age Discrimination in Employment Act.

Examination of the evidence indicated that there is reasonable cause to believe that these allegations are true. No determination is made as to any other issues which might be construed as having been raised by this charge.

Accordingly, I conclude that Respondent violated Title VII of the Civil Rights Act of 1964, as amended, and the Age Discrimination in Employment Act, by retaliating against the Charging Party for filing grievances and complaints against them and terminating his services because of his age.

Having determined that there is reasonable cause to believe the charges are true, the Commission now invites the parties to join with it in a collective effort toward a just resolution of this matter. A "Notice of Conciliation Process" is enclosed for your information. A representative of this office will be in contact with each party in the near future to begin the conciliation process.

The ADEA allegations of the above numbered charge are subject to separate statutory provisions. The Commission has found a violation under the ADEA. The findings with respect to ADEA violations are enclosed. The Charging Party also has a right to sue under the ADEA.

Unlike Title VII, the ADEA does not require the Charging Party to bring suit within 90 days of final agency action. (See the enclosed pamphlet for time limitation filing suit under the ADEA).

If you have any questions regarding the differences in legal remedies between Title VII and the ADEA, please contact Sidney Harris, Director, Buffalo Local Office at (716)846-4441.

On behalf of the Commission:

| | |
|------|--------------------------|
| Date | Arthur W. Stern |
| | Deputy District Director |
| | New York District Office |

Enclosures:
Notice of Right to Sue
Copy of Charge
ADEA Pamphlet

(EEOC letterhead)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
BUFFALO AREA OFFICE
210 FRANKLIN STREET, ROOM 503
BUFFALO, NEW YORK 14202

Charge No: 023840459

George F. Kleinmann
749 Scotland Avenue
Albany, New York 12208

Charging Party

New York State Office of
Mental Retardation and
Developmental Disabilities
44 Holland Avenue
Albany, New York 12229

Respondent

LETTER OF VIOLATION

I issue on behalf of the Commission the following findings as to Respondent's compliance with the Age Discrimination in Employment Act (ADEA).

The Commission has determined that the above named Respondent has discriminated

against George F. Kleinmann in violation of the ADEA by abolishing his position and discharging him from employment because of his age (57) and his opposition to practices by Respondent which are forbidden by the ADEA.

Section 7(b) of the ADEA requires that before instituting any action, the Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the ADEA through informal methods of conciliation, conference and persuasion. Section 7(e)(2) of the ADEA provides that the statute of limitations period which is applicable to Commission enforcement will be tolled for up to one year after conciliation is begun.

This determination will serve as notification that the Commission is prepared to commence conciliation in accordance with Section 7(b). The period during which the statute of limitation is tolled, as provided in Section 7(3)(2), begins upon issuance of this letter.

On behalf of the Commission

Arthur W. Stern
Deputy District Director
New York District Office

Date

(EEOC letterhead)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
BUFFALO AREA OFFICE
210 FRANKLIN STREET, ROOM 503
BUFFALO, NEW YORK 14202

January 10, 1984

Case Control Unit-EEOC Section
State of New York
Division of Human Rights
#2 World Trade Center, 53rd Floor
New York, New York 10047

Re: Charge No.: 023840459
George Kleinman v NYS Mental Health
Office

Dear Sir/Madam:

Enclosed for filing with your agency is a copy of the above-referenced charge filed with the Equal Employment Opportunity Commission which alleged unlawful practices under the Age Discrimination in Employment Act (ADEA). This referral is made for the sole purpose of protecting

the private suit rights of the Charging
Party under the ADEA.

Upon receipt of a charge, the EEOC is
required to attempt to resolve the matter
through informal methods of conciliation,
conference, and persuasion. We plan to
initiate conciliation action and to
undertake further appropriate processing
of this matter in the near future.

Thank you for your cooperation in this
matter.

Sincerely,

Sidney Harris
Area Director
Buffalo Area Office

SH/etc

Enclosure

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

BUFFALO AREA OFFICE
210 Franklin Street, Room 503
Buffalo, New York 14202

RECEIPT FOR COPY OF CHARGE OF DISCRIMINATION

(To be completed by respondent upon receipt of a Charge of Discrimination and returned to the EEOC District Office named above or the EEOC representative named below.)

CHARGE NUMBER **023627A52** (ALPHANUMERIC)

CHARGING PARTY(IES)

George E. Eisman

NYC Mental Health Office

I hereby acknowledge receipt ☐ by mail ☐ personally, a copy of the charge(s) of discrimination identified above, stating generally, without elaboration, the violation of Title VII of the Civil Rights Act of 1964. The signing of this receipt does not constitute admission of liability of Title VII or any other law.

DATE INDIVIDUAL ACCEPTING CHARGE (Title) SIGNATURE

CERTIFICATION I certify that I personally mailed/delivered a copy of the Charge(s) identified above to the respondent.

DATE **5/2/76** EEOC REPRESENTATIVE (Typed name) **Harold M. Smith** SIGNATURE **Harold M. Smith**

EEOC FORM 150
MAY 73

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CHARGE OF DISCRIMINATION

IMPORTANT: This form is subject to the Privacy Act of 1974, and Privacy Act Statement on reverse side of this form.

CHARGE NUMBER (B) (AGENCY USE ONLY)

☐ STATE/LOCAL AGENCY

☐ BEOC 01, 5/1/83

U.S. DEPARTMENT OF LABOR, BUREAU OF EMPLOYMENT OPPORTUNITIES AND NEW YORK STATE DIVISION OF HUMAN RIGHTS

(Name of Local Agency)

NAME OF PERSON OR FIRM: MR. GEORGE KLINMANN

STREET ADDRESS: 741 NEW LESTER AVE

CITY, STATE AND ZIP CODE: AWAHI, H.I. 96814

TELEPHONE NUMBER (include area code): 518 489 0336

NAME OF THE EMPLOYER (LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (If any, print one not above))

NAME: NEW YORK STATE DIVISION OF HUMAN RIGHTS

STREET ADDRESS: 44 HAWAIIAN AVENUE AWAHI, H.I.

CITY, STATE AND ZIP CODE: 12229

TELEPHONE NUMBER (include area code)

STREET ADDRESS

CITY, STATE AND ZIP CODE

Kind of Discrimination Based On (check appropriate box) AGE SEX RELIGION NATIONAL ORIGIN OTHER (Specify) 1 2 4 5 6

☐ RACE ☐ COLOR ☐ SEX ☐ RELIGION ☐ NATIONAL ORIGIN ☐ OTHER (Specify)

DATE AND TIME OF INCIDENT OR CONTINUING DISCRIMINATION

THE PARTICULARS ARE: 1. I WAS EMPLOYED BY THIS AGENCY FROM APRIL 1, 1973 TO MAY 1, 1973 AND WAS RECENTLY OFFERED A NEW POSITION.

2. ON JANUARY 3, 1983 I WAS ADVISED BY THE AGENCY THAT I WAS NOT BEING REEMPLOYED DUE TO MY AGE. I WAS 37 YEARS OLD AT THE TIME.

3. BEFORE WE COULD BE SETTLED, THE AGENCY SENT ME A WRITING DATED MAY 11, 1983. I WAS TOLD THAT MY RIGHTS OF SENIORITY AND MY ACCUMULATED VACATION WAS BEING ME. DATES ON MEDICAL RECOMMENDATIONS LETTERS OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS WERE REFERRED TO CORRELATE THE DISCRIMINATION OF THE STATE AGENCY TO CORRELATE THE DISCRIMINATION OF THE STATE AGENCY.

4. I CANNOT DAMAGE TO DATE MY FUTURE: THE AGENCY (333 S. 1ST ST. NEW YORK, N.Y. 10003) HAS OFFERED ME A POSITION OF \$66.3 - \$68.3 PER HOUR OF PAY AND TRAVEL EXPENSES OF \$26.00 PER HOUR. I DEMAND RESTITUTION OF ALL THE ABOVE COSTS.

OPTIONAL: IF YOU HAVE BEEN DISCRIMINATED BY AN EMPLOYER, YOU MAY WANT TO FILE A COMPLAINT WITH THE EEOC (28-100) UNDER SECTION 101. (If you have been discriminated by an employer, you may want to file a complaint with the EEOC (28-100) UNDER SECTION 101.)

I declare under penalty of perjury that the foregoing is true and correct.

DATE: 11-1-83

CHARGE NUMBER (B) (AGENCY USE ONLY)

PRIVACY ACT STATEMENT: THIS FORM IS OBSOLETE AND MUST NOT BE USED

CHARGE C. PART 3 COPY

A-244

(EEOC letterhead)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
BUFFALO AREA OFFICE
210 FRANKLIN STREET, ROOM 503
BUFFALO, NEW YORK 14202

December 21, 1984

Edward Kleinman
749 Scotland Avenue
Albany, New York 12208

Charge No: 023840459
Respondent: Office of Mental
Retardation and
Developmental Disabilities

Dear Mr. Kleinman:

This is to remind you that the statute of limitations period for obtaining relief under the Age Discrimination in Employment Act (ADEA) is two years preceding the date a private lawsuit is filed, or three years, if the violation is willful. As you are aware, the Commission has found that the Office of

Mental Retardation and Developmental Disabilities has violated the ADEA, and we are currently trying to negotiate a settlement with respect to our findings. These settlement attempts by the Commission are required by the ADEA. While they serve to extend the time frame for the Commission to file a lawsuit, they do not postpone the date by which a private lawsuit must be filed. Thus, you should contact me or Raphael DuBard immediately for advice as to the steps necessary to safeguard your rights under the ADEA. If you have an attorney, we advise you to share this letter with him/her.

Please call collect, at 716/846-4441, if you have to call long distance.

Sincerely,

/s/

Sidney Harris, Director
Buffalo Local Office

A-246

APPE

VOL.

NDIX

III

91-775

FILED

JUN 25 1991

OFFICE OF THE CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

GEORGE KLEINMANN,

Petitioner,

v.

MARIO CUOMO, AS GOVERNOR OF THE
STATE OF NEW YORK, THE STATE OF NEW
YORK AND ARTHUR Y. WEBB, AS
COMMISSIONER OF THE NEW YORK STATE
OFFICE OF MENTAL RETARDATION AND
DEVELOPMENTAL DISABILITIES,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI
APPENDIX - VOLUME 3

MADELINE SHEILA GALVIN
Attorney for Petitioner
217 Delaware Avenue
Delmar, New York 12054
(518)439-7734



INDEX

PAGE

VOLUME I

JUDGMENTS, ORDERS AND DECISIONS

Judgment, United States District
Court, Northern District of New
York, Kleinman [sic] v. Cuomo, et al.,
Case #85-CV-519, Dated June 13, 1989
. A-1

Decision, United States District
Court, Northern District of New York,
Kleinman [sic] v. Cuomo, et al.,
85-CV-519, June 13, 1989 A-2

Summary Order, United States Court of
Appeals, Second Circuit, Kleinmann v.
Cuomo, et al., #89-7695, filed
January 18, 1990 A-15

Findings of Fact, Conclusions of Law,
U.S. District Court, Kleinman (sic.) v.
Cuomo, et al., 85-CV-519, Dated June 20,
1990 A-18

Summary Order, U.S. Court of Appeals,
Second Circuit, Kleinmann v. Cuomo, et
al., 89-7695, filed January 3, 1991
. A-30

Order, U.S. Court of Appeals, Second
Circuit, Kleinmann v. Cuomo, et al.,
Filed February 27, 1991 A-36

~~Summary Order (First Page Only) U.S.~~
Court of Appeals, Second Circuit,
Kleinmann v. Cuomo, et al., #89-7695,
Stamped Filed January 3, 1991, received
in office of Plaintiff-Appellant counsel
March 11, 1991 A-38

ADMINISTRATIVE DECISIONS, DETERMINATIONS
AND OPINIONS

Budget Bulletin, B-1076, February 9,
1983, Determination, Michael Finnerty,
Statewide Personnel Reduction Policy,
Plaintiff's Trial Exhibit 9. . . . A-41

OMRDD, New York State Office of Mental
Retardation and Developmental
Disabilities, Decision, Statement of
Abolished Positions, March 2, 1983,
Trial Exhibit 51. A-61

VOLUME II

Notice of Abolished Positions, Form BD-
98, Decision of Division of the Budget,
effective May 4, 1983, Trial Exhibit
69 A-132

OMRDD, State of New York Office of Mental
Retardation and Developmental
Disabilities, Grievance Decision, April
4, 1983A-136

OMRDD, State of New York Office of Mental
Retardation and Developmental
Disabilities, Second Step Decision,
Grievance, April 20, 1983
.A-163

Arbitor's Opinion and Award, Governor's
Office of Employee Relations, In the
Matter of Arbitration between Public
Employees Federation, AFL-CIO and State
of New York, OMRDD, (George Kleinmann)
File #83-05-598, dated May 16, 1984
.A-176

OMRDD, State of New York Office of Mental
Retardation and Developmental
Disabilities, Grievance Decision, dated
May 18, 1983 A-201

Step 3 Decision, State of New York
Governor's Office of Employee Relations,
In the Matter of Public Employees
Federation, AFL-CIO, George Kleinmann,
Grievant, against State of New York,
OMRDD, OER File No. 83-05-366,
Dated June 10, 1983 A-214

OMRDD, State of New York Office of Mental
Retardation and Developmental
Disabilities, Grievance, Second Step
Decision, June 30, 1983
. A-218

Step 3 Decision, State of New York
Governor's Office of Employee Relations,
In the Matter of Public Employees
Federation, AFL-CIO, George Kleinmann,
Grievant, against State of New York,
OMRDD, OER File No. 83-05-598, Dated
August 8, 1983 A-229

Equal Employment Opportunity Commission,
Arthur W. Stern, Deputy District
Director, Determination of Violation,
Charge No. 02840459, Dated _____,
Plaintiff's Exhibit 1A A-233

Letter of Violation, Equal Employment
Opportunity Commission, Arthur W. Stern,
Deputy District Director, Dated March 29,
1985 A-238

VOLUME III

New York State Department of Civil
Service, Determination of February, 1983,
Guidelines for the Administration of
Reductions in Force in New York State
Departments and Agencies A-247

Equal Opportunity Commission, Commission
Report, Letter dated May 19, 1986, Ann
Thacher Anderson, Senior Trial Attorney
. A-356

Equal Opportunity Commission, Freedom of
Information Act Determination pursuant to
5 U.S.C. Sec. 552 (b)(5), October 19,
1987 A-~~362~~

New York State Civil Service Law

Section 80A-365(1)

THE FOLLOWING ITEMS HAVE BEEN LODGED WITH
THE CLERK'S OFFICE

VOLUME IV

OTHER MATERIAL

Complaint, United States District Court,
Northern District of New York,

Kleinmann v. Cuomo, et al., dated

April 9, 1985A-366

Stipulation to Withdraw Appeal from
Active Consideration, United States Court
of Appeals, Second Circuit, Kleinmann v.
Cuomo, et al., So Ordered August 25,
1989, Docket No. 89-7695A-388

Notice of Reinstatement, United States
Court of Appeals, (Mistitled United
States District Court, Northern District
of New York), Second Circuit, Kleinmann
v. Cuomo, et al., filed October 1, 1990
. A-390

Rockwell Memo to Cuite, April 27, 1983,
Trial Exhibit, Plaintiff's Exhibit #152,
received in evidence 6/7/89A-393

CHARLES MICHAEL DEVANE, Trial Testimony
transcript pages 154-217
(Transcript Vol. II) A-395

GEORGE KLEINMANN, Trial Transcript,
Application for continuance to obtain
new Counsel (Denied on record),
transcript pages 2-13 (Transcript Vol.
III) A-499

PAGE

VOLUME V

LUCY KLEINMANN, Trial Transcript,
pages 13-25 (Transcript Vol III)
.A-518

Defense Motions at close of plaintiff's
case, transcript pages 25-47
(Transcript Vol. III) A-539

THOMAS CUI TE, portions of Trial
Testimony, (Transcript Vol. III) . .A-575

VOLUME VI

THOMAS CUI TE, portions of Trial Testimony
continued. A-642

PAGE

Letter, Kleinmann to Rockwell, dated
April 7, 1983, claiming Computer
Programmer Job, Plaintiff's Trial Exhibit
#146 A-721

U.S. District Court, Northern District of
New York, Letter dated September 12, 1990
concerning Supplemental Index . . .A-724

Briefing Order, United States Court of
Appeals, Second Circuit, Kleinmann v.
Cuomo, et al., filed October 3, 1990
. A-735

United States Constitution,
Amendment 6A-737

United States Constitution,
Amendment 14 A-738

| | |
|---------------------------------------|--------|
| Federal Rules of Appellate Procedure, | |
| Rule 35 | .A-740 |

| | |
|---------------------------------------|--------|
| Federal Rules of Appellate Procedure, | |
| Rule 40 | .A-743 |

| | |
|---------------------------------|--------|
| 28 U.S.C. Section 455 | .A-745 |
|---------------------------------|--------|

| | |
|------------------------------------|-------|
| 29 U.S.C. Section 621 et seq . . . | A-753 |
|------------------------------------|-------|

| | |
|---------------------------------|--------|
| 29 U.S.C. Section 623 | .A-756 |
|---------------------------------|--------|

| | |
|---------------------------------|--------|
| 29 U.S.C. Section 631 | .A-759 |
|---------------------------------|--------|

| | |
|-----------------------------------|--------|
| 42 U.S.C. Section 2000e, et seq . | .A-760 |
|-----------------------------------|--------|

| | |
|--|--------|
| Federal Rules of Civil Procedure 52(a) | |
| | .A-771 |

GUIDELINES FOR THE ADMINISTRATION ON
REDUCTIONS IN FORCE IN NEW YORK STATE
DEPARTMENTS & AGENCIES

NYS Department of Civil Service
February, 1983

TABLE OF CONTENTS

Introduction

- Part I Concepts and Critical
 Definitions
- Part II Methodologies and Procedures
- Part III Communications and Personnel
 Transactions Processing
- Part IV Information for Employees
- Part V Preferred List Administration
- Pat VI Synopses of Relevant
 Determinations
- Part VII Appendices

NYS Civil Service Law
 Sections 75, 80, 80-a, 85, 86,
 87, 64.1(c)

Classified Service Rules
 Sections 4.11, 5.5, 1.2b(2)

State Personnel Management Manual
 Section 2300

Booklet

"Information for Employees
Separated from State Service"

Instructions for Use of Seniority
Rosters

Affirmative Action/EEO Reduction in
Force Impact Analysis

INTRODUCTION

These guidelines are intended to provide agency personnel managers with concepts, methodologies and procedures which are essential to the effective administration of a reduction in force. The materials contained in these guidelines are generally limited to issues that exist from the point at which the overall agency plan is submitted to the Division of the Budget. However, we have also included in the appendix portion, critical information concerning Affirmative Action/Equal Employment Opportunity impact analysis that must be completed prior to submitting the overall plan.

While we expect these guidelines to provide general assistance in dealing with a wide range of issues, personnel managers are advised to work closely with their designated Civil Service liaisons as specific needs and questions arise.

Additional materials are being developed and will be distributed for inclusion in these guidelines in the coming weeks.

PART I

CONCEPTS AND CRITICAL DEFINITIONS

PART I, CONCEPTS AND CRITICAL DEFINITIONS

The term "layoff" is commonly used whenever an employee is separated from State Service. However, not all employees who are "laid off" are entitled to "rights" under the Civil Service Law. To have rights under these Sections the employees and nature of the separation itself must meet the following general conditions:

The separation must occur because positions are being abolished;

The employees must have permanent status;

The employees are in competitive or non-competitive jurisdictional class positions. Labor class employees are

granted similar rights through negotiated agreements.

Layoffs in the context of this material are always confined to layoff units and to the titles and positions identified in these units. Formal determinations of layoff unit definition exist for every State department and agency and may reflect agreements made through collective bargaining.

It is within the defined layoff unit that employees are suspended or demoted, exercise their rights to be retained, and within which they displace (bump or retreat). These terms are described in more detail later.

Definitions of Some Critical Layoff Terms

1. Retention Rights - Employees have different rights to be retained under Section 80 and 80-a according to jurisdictional classification, their status in a position, and their seniority.

Without Retention Rights

- Provisional and temporary employees,
- Employees in exempt and unclassified service positions,
- Non-competitive class (and labor class) employees who do not have tenure protection outlined under Section 75.1(c)

of the Civil Service Law,
modified by negotiated
agreement (see below),

- Permanent contingent employees
appointed under old Rule 4.11.

With Retention Rights

- Permanent competitive class
employees, including
probationers and contingent
permanent employees appointed
under new Rule 4.11 (post
12/18/80),
- Permanent non-competitive (and
labor class) employees having
tenure protection under Section
75.1(c) as modified to include
those having one year of
continuous service.
- Of those that do have retention

rights, some have greater retention rights, or rights to be retained, than others. Probationary employees are defined by law as having less retention rights than those who have completed their probation. That is, a probationer must be laid off in a title before a non-probationer. Within either of these categories employees are laid off in seniority order.

2. Seniority - Seniority for purposes of layoff should not be considered synonymous with seniority for other purposes such as retirement, anniversary dates, seniority for

leave accrual purposes, or seniority for bidding for shift work or pass days. For layoff, the definition is:

DATE OF ORIGINAL PERMANENT
APPOINTMENT IN THE CLASSIFIED
SERVICE AND CONTINUOUS SERVICE SINCE
THAT DATE.

This date is modified, however, for veterans who get 2 1/2 years additional seniority, disabled veterans who get 5 years additional seniority, and legally blind employees who regardless of their original date of permanent appointment are considered the most senior employees of all employees in their title in the same category of retention status.

3. Continuous Service - Seniority -
Continuous service, is defined for determining seniority under Section 80 and 80-a as service unbroken by periods out of service of one year or more. For example, a permanent competitive employee's employment history file reads:

OC Perm 1/1/80

Resign 6/1/81

Perm Reinst 5/1/82

The employee's seniority data is 1/1/80 (assuming non-vet).

4. Continuous Service for Determining Tenure Protection Under Section 75.1(c) - is also defined as service unbroken by periods out of service

of one year or more. The difference between these two types of "continuous service" is that for Section 75.1(c) this service need not be permanent. Only persons who have permanent service at the time of suspension have rights under 80-a.

PART II

METHODOLOGIES AND PROCEDURES

PART II

METHODOLOGIES AND PROCEDURES

The efficient administration of a reduction in force regardless of the number of positions and employees affected requires the development and consistent application of a methodology that will enable the personnel manager to systematically deal with the people and issues involved.

At the outset, we suggest the following as a basic first step in order to begin the process of identifying actions to be taken that directly affect employees' status.

Based on the plan for the Reduction in Force, we suggest developing an "Organizational Layoff Schematic" for each designated layoff unit. This "Schematic" or chart can be drawn by listing all titles in which positions will be abolished in each of the layoff units starting with the highest level title and continuing to the lowest.

For each of the titles which appear on the schematic or chart, identify the "direct line of promotion". For these purposes, direct line of promotion is a narrow concept and generally means that such titles must have a common generic root. For example, a direct line would exist in the case of Clerk, Senior Clerk, Principal Clerk, Head Clerk, Chief Clerk-

Senior File Clerk would not be in direct line even though a number of Senior File Clerks in the department may have, in fact, been promoted to Principal Clerk from the Senior File Clerk position. Many direct lines are obvious, however, such determinations must be made as early as possible. Any questions concerning direct line should be directed to your designated liaison in the Department of Civil Service.

By charting out the portions of the organization affected and identifying direct lines of promotion, you can begin to recognize and deal with the "chain reaction" facet of layoff administration. The first effects of decisions to abolish certain positions

obviously impact employees in that title. These decisions and actions taken will probably, through displacement procedures, effect employees in the next level and so on down through the direct line and potentially throughout the entire layoff unit.

It may be helpful to view layoffs as occurring in "waves" in which decisions made for one level impact the next and the next and so on, leaving behind a trail of reversions to old items, reassignments, and vertical displacements with concurrent establishment of referred list status and eventually outright terminations.

The critical point is that decisions

concerning one individual employee probably affect other employees' rights. Consequently, impacts on all employees must be anticipated and considered.

In order to identify specific employees who may be affected directly or indirectly by the planned reduction in force, certain basic sources of employee related information are necessary.

The first is a Seniority Roster. The seniority roster is produced from the Department of Civil Service Automated Payroll and Personnel System (APPS) and is based on information as of a given payroll date. Each agency is responsible for ensuring that the information is correct. New hires or separations in a

title identified for layoff and reflected on the seniority roster should be added by the agency prior to making final layoff decisions.

Information on individual employees, i.e., status (permanent, temporary, probationer), veterans status, sights status, etc., is assumed to be correct. Any changes in this information must be made in writing to the Department of Civil Service with an explanation of the reasons for the change and appropriate documentation, e.g., copies of a DD-214, appointment letter, probationary report, etc. Each agency is responsible for correctly identifying which employees will be laid off and which retained pursuant to Section 80 and Section 80-a

of the Civil Service Law.

Reading The Seniority Roster

1. The roster includes all titles.

This was done for ease of production, and to allow each agency to assess potential impact of layoffs in any program area.

2. The roster is provided in title code order, from the lowest number to the highest number. To find a specific title (see exception below) use your Title and Salary Plan to find the title code for the title.

3. Although trainee titles are assigned separate title codes in the Title and Salary Plan, employees serving in these titles are treated as probationers for the journey level

title for layoff purposes. All employees serving in those positions whether as trainee or at a journey level must be considered as one group under one title. The grouping of titles was done by assigning "dummy" title-codes combining these employees (e.g., 999999A). These will be listed at the end of the seniority roster.

4. Some names may appear more than once. Permanent employees on leave from a position must be considered with employees actually serving in a position in a title affected by reductions. The seniority roster will show both a vacant position with encumbering information and the encumbering employee's name in the

appropriate rank on the seniority roster.

5. The seniority roster ranks all items in a title as follows:
 - a. Vacancies
 - b. Non-permanent employees (and contingent employees (old rule, prior to 12/18/90)
 - c. Probationers
 - d. Fully permanent employees"New rule" contingent-permanent employees appear in their appropriate categories probationers or fully permanent employees.

Note that under Civil Service Law and layoff procedure all non-permanent employees in a title are equally at risk in layoff situations

since they have no retention rights or seniority. Therefore, the "rank" of non-permanent employees on a seniority roster may be ignored when such employees are terminated. However, this does not preclude an agency from using date of appointment to the classified service as an equitable mechanism for making these decisions.

Probationers and fully permanent employees are ranked among themselves in seniority order under "Class. Senior. Date." This date includes adjustments for veterans status. Where the APPS system has no information on veterans status, employees are coded as non-vets.

Blind employees will appear as the most senior employees among all employees with equal retention rights in the title. For example, a blind probationer is the most senior of all probationers in that regardless of date of original permanent appointment, but is still less senior than fully permanent employees in the title.

6. The codes used under "APPT TYPE" are defined as follows:

| | | |
|-----|---|-------------------------------------|
| VA | = | Vacant |
| PV | = | Provisional |
| TP | = | Temporary |
| COP | = | Contingent Permanent Probationer |
| PMP | = | Permanent Probationer |

PM = Permanent - probation
completed

CO = Contingent Permanent -
probation completed

7. All questions on seniority rosters should be directed to your designated liason in the Department of Civil Service.

The second employee information source is completed Employee Information and Location Sheets (EI/LS). The Department of Civil Service is currently providing EI/LS for agency use in allowing employees to verify their title, veteran's status, probationary status, preferred list seniority and address information and to allow employees to

indicate the counties in which they would accept reemployment from a preferred list. El/LS is not to be used as a notice of layoff.

El/LS are not to be sent to the Department of Civil Service to place names of employees on a preferred list. You should, however, find these useful when completing the Preferred List Eligible Cards which are to be submitted to the Department of Civil Service.

A third source of employee information is strongly suggested depending upon the size and geographic distribution of a particular agency layoff unit.

If the layoff unit involves a large number of employees and is complicated by multiple geographic locations, it is

critical for agencies to obtain employee locational references for both possible reassignment and displacement (bump or retreat) prior to planning specific movements of personnel. A sample questionnaire for use in obtaining this information is supplied on the following page. Such a questionnaire requires that the agency prepare and attach a listing of specific location possibilities within the layoff unit.

Location Preference Questionnaire

Reassignment and Vertical Displacement

Name

Social Security Number

Signature

Date

The information requested by this form is necessary to ensure that each employee who is impacted by a reduction in force is treated equitably during the reassignment and vertical displacement (bumping) phase.

This form will not be used to record your location preference for reemployment from any preferred list.

Only the location possibilities within your layoff unit, as indicated on

the attached sheet, may be selected for reassignment or for vertical displacement.

You must list locations where you are willing to accept reassignment in your present permanent title and vertical displacement to the next lower level direct line title in absolute order of preference. Separate column are provided for reassignment and vertical displacement.

This form must be returned to the personnel office by _____. If not received by that date you will be considered only for locations within the county of layoff. Choices for reassignment and vertical displacement may not be changed after _____.

Preffered list location choices that

you supply separately may be added to at
a later date by writing to the NYS
Department of Civil Service.

REASSIGNMENT

VERTICAL

DISPLACEMENT

Reductions in Force in Layoff Units Where Only One Geographic Location is Involved. Referring to your agency plan, identify the highest level title in which positions will be abolished, and the number of positions to be abolished in that title. Use the seniority roster to identify employees retention standing and seniority.

Three categories of employees will be identified. Each category and the relative retention standing of each of these categories is discussed below.

1. Non-permanent Employees - Identify all temporary and provisional employees and contingent permanent employees appointed prior to 12/18/80. (Rule 4.11 revised

effective 12/18/80) These employees have no retention right, no rights to preferred list status, and must be suspended before permanent or permanent probationary employees serving in the target layoff title.

2. Probationary Employees - Next identify employees serving in a probationary status. Probationary employees have less retention standing than fully permanent employees. They are, however, entitled to preferred list status if suspended, and mayu also be entitled to exercise vertical displacement rights if they are unable to be restored to their hold items (Rule 5.5(d) and (2).
3. Permanent and Contingent Permanent

(Post 12/18/80) Employees - Identify employees serving in permanent and contingent permanent (post 12/18/80) status. (Rule 4.11 revised effective 12/18/80) These employees have the most retention rights. They are entitled to exercise verticle displacement rights, bumping or retreats, (bumping rights are only available in the competitive class). If suspended their names will be placed on a preferred list.

Identifiy Employees To Be Suspended

Based on the number of positions to be abolished, identify the employees who will be suspended.

Step 1 - Suspension of Non-permanent
Employees

- a. If these non-permanent employees are on leave from other permanent positions in the layoff unit, restore them to their hold items.
- b. If these employees are on leave from other agencies, notify the agency(ies) immediately that the employee will be suspended.
- c. If employees have no hold items (i.e., no permanent reinstatement rights) prepare notice of separation (three weeks prior to actual termination date) and enter their name on a list of

employees not entitled to
layoff rights or preferred list
status.

If the number of non-permanent employees equals the total number of positions to be abolished in the target layoff title no further action for the title is necessary. If the number of non-permanent employees is less than the total number of positions to be abolished, proceed to the next step.

Step 2 - Suspension of Probationers

Identify the probationers (beginning with the least senior) to be suspended.

- a. Restore them to their hold items.

- b. If these employees are on leave from other agency(ies) notify the agency(ies) immediately that the employee will be suspended.
- c. The names of probationers so restored will be placed on a preferred list for the target layoff title.
- d. Only where no hold item is available for the return of the probationer may the probationer be considered for vertical displacement opportunities.
(See Step 3 below).

If the number of positions to be abolished is greater than the number of employees suspended in Steps 1 and 2, proceed to Step 3.

Step 3 - Suspension of Permanent or
Contingent Permanent (post 12/18/80)
Employees.

These employees have the greatest
rentention standing and may be entitled
to exercise vertical displacement rights.
(See below for specific procedures for
(a) Bumping and (b) Retreat).

a. Bumping

In order to determine if bumping can
occur you will need to refer to the
layoff plan, the agency organization
schematic, the direct line promotion
title listing, and the seniority
roster.

Only if lower level direct line
titles exist in the layoff unit, and

only if they are occupied, that is not all vacant or not simultaneously abolished, can bumping occur. If these conditions are met, proceed as indicated below.

1. Begin with the most senior employee whose position will be abolished.
2. Identify the least senior employee in the lower direct line title with the least retention rights/seniority.

Note that a probationer who may be eligible to exercise "bumping" rights can only do so if the employee serving in the lower direct line title is also a probationer and has less seniority.

3. Determine if bumping employee has more retention rights/seniority than the employee identified in (2) above. If so, bumping can occur. Note that a probationer who may be eligible to exercise "bumping" rights can only do so if the employee serving in the lower direct line title is also a probationer and has less seniority.
4. Repeat the steps in (1), (2) and (3) above until the remaining employees in the layoff target title have been accounted for. If at any point in this part of the process you find that an employee in the

layoff target title has less retention rights or less seniority than an employee serving in the lower direct line title, no further bumping can occur, nor can the employee(s) be considered for retreat rights.

5. If the senior employee's seniority is greater than the seniority of an employee serving in a lower direct line title the senior employee can bump and his or her name will be placed on a preferred list for the target layoff title.
6. If the senior employee's seniority is equal to or less than the seniority of the

employee serving in the lower direct line title bumping cannot occur, nor can the senior employee be considered for Retreat. The senior employee must be laid off and his/her name placed on a preferred list.

b. Retreat

Retreat can only occur when no lower level occupied position in a direct promotion line title exists in the layoff unit. "Retreat" means return to the lower title -- held on a permanent basis. In order to determine an individual's retreat rights, a number of factors relating to the individual's specific

(

employment history must be considered.

You will need to refer to each employee's employment history, the agency organization schematic for the layoff unit, and the seniority roster.

1. Determine if the employee's last permanently held lower classified service title exists in the layoff unit, and if it is currently occupied.
2. If title does not exist or if title is not occupied, retreat cannot occur.
3. If title is occupied, identify the least senior employee in lower level title with the

least retention
rights/seniority.

4. Determine if "retreating"
employee has more seniority
than employee identified in (3)
above. If so, retreat can
occur.
5. Repeat steps 1 through 4, until
the remaining employees in the
target layoff title have been
accounted for.
6. If at any time an employee in
the layoff target title has
less seniority than an employee
serving in the title being
considered for retreat, retreat
cannot occur for that employee.
7. If the conditions for Retreat
are met the employee(s) name(s)

will be placed on a preferred list for the target layoff title.

8. If the conditions for Retreat are not met, the employee(s) must be laid off and their name(s) placed on a preferred list.

(HANDWRITTEN NOTATION ON THIS PAGE)

"Not done with George. Only found out about retreat when PEF representative told them -"

Step 4

Repeat Steps 1 through 3 for each succeeding lower level target layoff title using your _____ncy layoff plan and the "organizational layoff schematic".

As work on each title is completed, you should be sure to annotate the seniority roster. Develop listings, categorizing the employees who have been affected, how they have been affected, i.e., restoration to hold items, whether they exercised displacement rights, whether they were or were not entitled to preferred list status, when layoff information was transmitted to Civil Service and what payroll transactions need to be prepared.

These listings serve as
documentation for the actions taken.

Information concerning preparation
of employee notifications, Preferred
List Eligible Cards and payroll and
personnel transactions are provided
in Part III of these Guidelines.

Reductions in Force in Layoff Units Where
Multiple Geographic Locations Are
Involved

Reductions in force which occur in layoff units involving multiple geographic locations are infinitely more complex than those which occur in a single location. In addition applying and implementing the basic concepts concerning retention standing and seniority, together with vertical displacement rights, the agency's ongoing authority to assign and reassign staff becomes a significant factor in layoff administration. Although Sections 80 and 80(a) of the Law do not extend protection to employees in this regard, it is

important that agencies develop and apply consistent methods for implementing horizontal (lateral) reassignments when positions are to be abolished.

Lateral reassignments may be accomplished in a number of ways which will meet legal requirements, and agencies are advised to carefully consider the method selected and utilized. Based on the experiences and insights gained in administration of previous reductions in force, we recommend that an "Equal Numbers Method" of lateral reassignment be utilized.

In brief, this "Method" calls for identifying and sorting a group of more senior incumbents of positions which are being abolished. against a group of equal number of the least senior employees

serving in positions which will not be abolished, and which exist at other locations in the same layoff unit. An "Equal Numbers Method" provides a practical administrative process by which expanded lateral displacement opportunities are afforded to the identified group of senior employees in relation to the identified group of least senior employees.

Quickly obtaining an accurate, ranked listing of the location preferences of the group of senior employees is critical to the sorting process. In this regard agencies should make every attempt to obtain information from employees as soon as possible, once it is known that a layoff is likely to occur (Classified Service Rule 5.5(b)).

This information should be obtained in writing whenever possible, and should be retained by the agency for documentation purposes. (See previous information on Geographic Location Questionnaire)

Employees who refuse a lateral reassignment to a location that they had previously selected where a less senior employee of the identified group is serving, cannot be considered for other lateral reassignments. (See Equal Method Procedures) Nor are they entitled to exercise vertical displacement rights. They must be suspended. Traditionally, such employees have been granted preferred list status in conjunction with established practice of the Department of Civil Service.

In keeping with the organizational

schematic discussed earlier, once again we recommend that the highest target layoff title be dealt with first, since the effects of the lateral reassignment phase may create a chain reaction directly impacting on lower level direct line titles and other lower level titles within the layoff unit.

Prior to beginning the reassignment phase, agencies should consider if non-permanent employees will be subject to immediate suspension or if they will be considered within the group of least senior employees once identified. Similarly the situations of probationers should also be considered prior to beginning the reassignment phase.

Procedures Outline for Administering
Reductions in Force in Multiple
Geographic Location Layoff Units

Begin with the highest level target
layoff title.

2. Identify the total number of
positions to be abolished.
3. Identify the number of positions to
be abolished in each geographic
location within the layoff unit.
4. Determine if non-permanent employees
will be suspended prior to lateral
reassignment phase.
5. Determine if probationers will be
included in the reassignment phase.
6. Use the "Equal Numbers Method" or a
method approved by your Agency's
designated Department of Civil
Service liaison, and complete

lateral reassignment phase. (See
Equal Numbers Method Procedures)

7. Determine Vertical Displacement Rights (Bumping or Retreat) for employees who were displaced as a result of the lateral reassignment phase.
8. Complete vertical displacements (Bumping or Retreat) if any.
9. Repeat procedures 2 through 8 using the Agency layoff plan and organizational layoff schematic.

Equal Numbers Method Procedures

Set forth below are the actual procedures to be followed in utilizing the "Equal Numbers Method" of lateral reassignment.

Assume that the following information has been identified:

- The total number of positions to be
abolished in the entire layoff unit.
- The geographic location of the
positions to be abolished.
- The number of positions to be
abolished at each geographic
location within the layoff unit.
- 1. Using the seniority roster for the
layoff unit, count down (from least
to most retention rights and
standing) to obtain a list of

employee names equal in number to the total number of positions that will be abolished in the target layoff title in the layoff unit.

(This group of employee names will be referred to as LESLU (Least Senior Employees in the Layoff Unit) in the following procedural steps.)

NOTE: If the number of non-permanent employees serving in the target layoff title is greater than the number of positions to be abolished, expand the LESLU Group to include all non-permanent employees. Permanent employees whose positions are to be abolished should be offered the opportunity to

displace any of these non-permanent employees. (See Step 6 Below)

2. Develop a seniority roster for each geographic location in the layoff unit.
3. At each geographic location where a position(s) will be abolished count down a corresponding number of names and draw a line. (In locations where no positions will be abolished, draw a line above the first name on the geographic location seniority roster(s)).
4. Three groups of employees can now be identified:

Group 1 - Employees whose names appear on both the layoff unit seniority roster (LESLU) and who

old position(s) being abolished in one of the geographic locations.

Group 2 - Employees whose names appear on the layoff unit seniority roster (LESLU) but who hold positions which will not be abolished.

Group 3 - Employees whose names were not identified on the layoff unit seniority roster (LESLU) and who hold positions which will be abolished.

5. Suspend all employees in Group 1, since they are least senior and their positions will be abolished.
6. Beginning with the most senior employee identified in Group 3

above, and using the employee's ranked geographic location preference(s), offer reassignment to any other geographic location where a Group 2 employee is serving.

- a. If the most senior Group 3 employee is willing to accept reassignment to any location in which a Group 2 employee is serving, that Group 2 employee is now identified for suspension.
- b. If the most senior Group 3 employee is unwilling to accept reassignment, then the Group 3 employee is laid off, and his/her name is placed on a Preferred List (assumes

permanent status).

- c. If the most senior Group 3 employee has not selected a location in which a Group 2 employee is serving, then the Group 3 employee is laid off and his/her name is placed on a Preferred List (assumes permanent status).

- 7. In seniority order (most to least) continue to compare each Group 3 employee and his/her geographic location preferences against the locations of the remaining Group 2 employees, until all Group 3 employees have been given the opportunity to laterally displace Group 2 employees.

8. If any Group 2 employees continue to hold positions after completion of the above comparisons, and any Group 2 employees were previously displaced, those Group 2 employees should now be given the opportunity to be retained in the available positions in order of their retention-standing and seniority.

SAMPLE PROBLEM - Equal Numbers Method

Assume an agency has 12 employees in a title working at these locations, Albany, Syracuse and Ne York City. All locations are in the same layoff unit and currently there are four employees at each location. Program needs require

that the New York City Office remain open and fully staffed, and Albany maintain at least three positions. However, management has decided to close the Syracuse Office. A total of five positions in the title will be abolished.

To provide more senior employees with an opportunity to retain a job and to lay off the least senior/least retention right employees, the agency compares the layoff unit seniority roster, and on each locational seniority list a line is drawn indicating the number of positions to be abolished. (Steps 1, 2 and 3 are discussed in the "Equal Numbers Method" Procedures).

GEOGRAPHIC SENIORITY

ROSTERS

LAYOFF UNIT

ALBANY/SYRACUSE/NEW YORK CITY

SENIORITY ROSTER

| | 1 | 4 | 0 |
|---------------|---|---|---|
| 1. NYC* | | | 1 |
| L | | | |
| 2. NYC* E | | | 2 |
| 3. Syracuse*S | | 3 | |
| 4. Albany* L | 4 | | |
| 5. Albany* U | 5 | | |
| 6. Albany | 6 | | |
| 7. Syracuse | | 7 | |
| 8. Albany | 8 | | |
| 9. Syracuse | | 9 | |

| | | |
|-------------|----|----|
| 10.Syracuse | 10 | |
| 11.NYC | | 11 |
| 12.NYC | | 12 |

TOTAL NUMBER OF POSITIONS TO BE
 ABOLISHED - - - - - 5

* LEAST SENIOR EMPLOYEES IN THE LAYOFF
 UNIT - LESLU.

As discussed in the "Procedures" (Step 4) those groups of employees can now be identified. They are:

Group 1 - Employees who appear on both the layoff unit seniority roster (LESLU) and who hold positions being abolished in one of the geographic locations. In this example, these employees are #3 in Syracuse, and #4 in Albany.

Group 2 - Employees who appear on the layoff unit seniority roster (LESLU) but who hold positions not being abolished. In this example these employees are #1 and #2 in NYC, and #5 in Albany.

Group 3 - Employees who were not

identified on the layoff unit seniority roster (LESLU) and who hold positions which will be abolished. In this example, these employees are #10, #9, and #7, all located in Syracuse.

Group 1 - (3,4)

Group 2 - (1,2,5)

Group 3 - (7,9,10)

Since employee #3 and #4 are found in Group 1, they are immediately identified for layoff. (See the Procedures - Step 5)

Employees in Group 3, are now compared with employees in Group 2 and are offered the opportunity for reassignment. (See Procedures - Step 6)

Employee #10 (most senior) is offered the first opportunity to be reassigned to either Albany (#5) or NYC (#1, or #2). Assume that #10 selects New York City. Since there are two Group 2 employees at that location, the agency should reassign #10 to the position held by the least senior employee, (#1).

Next, employee #9 who is now the most senior Group 3 employee, is offered reassignment to either NYC or Albany (employee #2 or #5). Assume employee #9 refuses either location. Employee #9 is notified that he/she will be laid off and his/her name placed on a preferred list. Employee #9 is also told he/she has no vertical displacement or retreat rights.

Employee #7 is now offered an opportunity to be reassigned to either

Albany or NYC (employee #2 or #5).

Assume #7 chooses Albany.

All Group 3 employees have now been compared and are accounted for. Two Group 2 employees remain, #2 in New York City and #5 originally located in Albany and who was displaced by #7.

Since employee #5 has more seniority than employee #2, employee #5 should be offered reassignment to New York City. (Procedures, Step 8). Assume employee #5 accepts.

The final outcome of the lateral reassignment is summarized below.

Employees - 2, 3 & 4

Result - Have section 80 rights, go on a preferred list; bumping or retreat rights to be determined.

Employees - 5, 7, 10

Result - Reassigned to new location
effective date of layoff.

Employees - 9

Result - No rights under Section 80 but
will be placed on a preferred list by
Civil Service policy for any locations
except New York County or Albany County.

Employees - 6, 11, 12

Result - No change in work location.

Reductions in Force - Non-Competitive and Labor Class Positions

The procedures used to administer reduction in force which affect non-competitive and labor class employees are similar to those previously discussed in detail in these Guildelines, therefore, they will not be repeated.

However, it is critical to understand that retention rights conferred upon non-competitive class employees under the provision of Section 80-a of the Civil Service Law, are contingent upon the tenure definition contained in Section 75.1(c) of the Law as modified by negotiated agreements. Although labor class employees are treated similarly, there is no statutory

provision which extends them such retention rights.

To obtain tenure rights under Section 75.1(c), employees must meet three criteria.

1. They must not be serving in positions designated by the Civil Service Commission as confidential or requiring the performance of functions influencing policy. Non-competitive class positions are listed in Appendix 2 of the Civil Service Law. Policy influencing or confidential positions are identified by the Greek letter (phi) in the listing. Do not confuse "confidential" with the bargaining unit designation of "managerial confidential", they are not

necessarily related.

2. Employees not designated as policy influencing or confidential must have at least one year of service prior to the date of layoff.

(Although Section 75.1(c) indicates five years, this has been modified by negotiated agreement to one year). - This service need not be permanent service to be qualifying for tenure protection under Section 75.1(c).

3. Service must be continuous, that is, there cannot be a break of one or more years.

Only when these criteria are met, and only when the employee is permanent at the time of layoff, can the provision of Section 80-a be applied.

Therefore, employees who meet the criteria, and who are permanent at the time of layoff are afforded retention rights, retreat rights, and if laid off, will have their names placed on a preferred list.

PART III

COMMUNICATIONS AND
PERSONNEL TRANSACTIONS PROCESSING

A-321

PART III

COMMUNICATIONS AND PERSONNEL TRANSACTIONS PROCESSING

Communications...

Between Agency and Department of Civil Service

- As soon as possible, agencies should provide the Department of Civil Service with information on the positions which may be affected by the layoff. This information should include the titles, numbers and locations of the positions to be abolished; other titles, including direct line titles, which may be affected by the bump and/or retreat rights of permanent employees; and titles which may be affected by the

return of employees to encumbered positions.

- Agencies will receive seniority rosters from the Department of Civil Service for all titles which are to be abolished and for all the titles which may be affected by the layoff. The accuracy of the seniority information provided in the rosters should be verified with employees. The Department of Civil Service should be immediately notified in writing of any discrepancies or errors, with an explanation of the change. Appropriate documentation must be provided.
- Two copies of completed Preferred List Eligible Cards (S-295, S-296, S-296.5) for each employee who is

entitled to preferred list status must be forwarded to the Department of Civil Service. Agencies should fill out these cards utilizing the verified seniority information, agency records and information received from employees regarding the geographic locations in which they would accept employment. If the laid off employee has displaced another individual in a lower grade, the title, grade and location of the lower grade position must be noted on the appointment portion of both copies of the cards.

Between Agencies and Employees

Notification letters should be sent by agencies to all affected by the reduction in force.

- Employees who are being laterally reassigned or transferred in lieu of layoff should be notified in writing of the effective date of the transfer or reassignment, the location of the new position, where and when to report to work, and any other pertinent information.
- Employees who are separated from target layoff titles -- Employees in this category who are exercising displacement (bumping or retreat) rights or who are being reverted to

hold items -- should be notified in writing of the effective date of the transaction, the location of the new position, the title to which they are bumping, retreating or reverting, where and when to report to work and any other pertinent information.

- Employees who are being separated from State Service -- A sample notification letter for employees who are being separated from State service has been distributed by the Division of the Budget.

In addition to this notification letter, these employees should be given copies of booklets "Information for Employees Separated from State Service" and "New York State Unemployment Insurance

Information for Claimants."

Further, employees who are being separated from State service and who have accumulated vacation credits exceeding the 30 days for which lump sum payment is made, should be notified that they will be permitted to use excess vacation credits up to the present maximum of 40 days.

Personnel Transaction Processing

The following is a listing of the transaction codes that should be used on Payroll and Personnel Transaction Forms, PR-75, when reductions in force occur:

Group I Transactions

Reinstatement Transactions

Rein LV reinstatement from an

encumbering leave -- use
this code to restore a
probationary employee to
his/her permanent hold
item.

DISPL Dir Displacement (direct) of
an employee from a higher
permanent title to a lower
level title, in a direct
line, in lieu of layoff.

DISP RET Displacement (retreat) of
an employee from a higher
permanent title to the
last lower title
previously held
permanently, which is not
in a direct line, in lieu
of layoff.

Transfer and Reassignment Transactions

REASGN LAY Lateral movement in the same title and grade within an appointing authority (in one payroll agency or across payroll agencies) to avoid layoff prior to the abolition of position taking place.

TR ~~LAYOFF~~ Lateral movement between appointing authorities to the same title and grade to avoid layoff prior to an abolition of positions taking

place.

Note: use this code only for movement between appointing authorities. Movements within an appointing authority are considered reassignment in lieu of layoff (REASGN LAY).

Group II Transactions

Separation Transactions For Use By Losing Payroll Agencies

| | |
|------------|--|
| REASGN OUT | Use to report a separation, as a result of lateral movement between payroll agencies under the same appointing authority in lieu of layoff |
|------------|--|

prior to abolition of
position.

Separation From Service Transactions

LAYOFF Layoff of an employee not
placed after abolition of
position.

LAYOFF

DIR Layoff (direct) of a
permanent employee
displaced by a higher
level employee in the
direct promotion line.

LAYOFF

RET Layoff (retreat) of a
permanent employee
displaced by a higher
level employee not in the
direct promotion line.

TERM Use this code for
 termination of non-
 permanent employees.

For complete information on how to
prepare Forms PR-75, refer to the
Department of Audit and Control Payroll
Manual.

PART IV

INFORMATION FOR EMPLOYEES

A-333

PART IV

INFORMATION FOR EMPLOYEES

The Appendices of these guidelines includes a copy of the booklet "Information for Employees Separated from State Service" which is to be provided to affected employees.

Supplies of that booklet may be obtained from the designated liaison in the Department of Civil Service.

In addition to the information contained in that booklet the following will be helpful to personnel staff in responding to the questions commonly asked by employees prior to the actual layoff.

Which Employees Have "Layoff Rights"
Under Civil Service Law

- Permanent Employees (including those

on probation) in competitive class positions.

- Contingent-permanent employees including those on probation (appointed since December 18, 1980 in competitive class position)
- Permanent employees (including those on probation in labor or non-competitive class positions who have at least one year of service and whose positions are not considered to be confidential or policy influencing.
- Any of the above employees (including those on probation in labor or non-competitive class positions who have at least one year of service and whose positions are not considered to be confidential or

policy influencing.

- Any of the above employees who are on authorized leave with or without pay.

Which employees Do Not Have "Layoff Rights" Under Civil Service Law

- Non-permanent employees (e.g., provisional or temporary employees) in any competitive, non-competitive, non-competitive or Labor class position
- Employees in exempt class positions
- Employees in unclassified service positions
- Permanent employees in non-competitive class or Labor class positions with less than one year of service

- Permanent employees in non-competitive class positions which are considered to be confidential or policy influencing

Of those employees in a title who do have rights, some have greater rights than others.

First, permanent employees who are on probation have less right to be retained than permanent employees in the same title who have completed their probation.

Second, among employees with equal retention status, (e.g., all permanent non-probationers) employees with less seniority have less right to be retained than more senior employees in the same title.

How Do Layoff Rights Apply to Another Job

Although any individual employee's rights may vary depending on the specific layoff situation, generally an employee's rights are as follows:

1. Reassignment - The right to be offered another position in the same title.

When only some positions are abolished in a title, the more senior employees in these positions may be offered an opportunity to take a position held by a less senior employee who will be laid-off. These reassignments may be to another unit or geographic location in the agency. Depending upon the seniority of the employee, the

program needs of the agency, and the number of employees being affected, more senior employees may have several or only one reassignment possibility. Employees who are offered a reassignment in their title, but who refuse it have no further rights under Civil Service Law. However, if the reassignment was to a different county, the Department of Civil Service will allow them preferred list status.

2. Rights to a Lower-Level Position

A) "Bumping" or Vertical

Displacement Competitive class employees who cannot be offered a same title reassignment either because they lack seniority, or because all of

the positions in their title are being abolished may be able to "bump" other less senior employees in direct-line lower-level titles that are not being abolished. For "bumping" to occur the situation must be as follows:

1) The lower-level position must be in a strict promotion direct-line, e.g.

- Principle Clerk, G-11
- Senior Clerk, G-7
- Clerk, G-3

Employees may not "bump" into collateral line titles such as in the above example, from

Principle Clerk to Senior
File Clerk.

- 2) The lower-level title must be occupied, i.e., not abolished simultaneously, or vacant (however, if in the example, the title of Senior Clerk did not exist or all positions were vacant, the Principal Clerk could bump a clerk).
- 3) The bumping employee has greater rights than the employee at the lower-level who has least rights. This means that, for example a probationer cannot "bump" an employee who has completed

probation, and that the bumping employee must have more seniority than the least senior employee.

Note that an employee who has "bumping" rights can only bump the "least" senior lower-level employee, and cannot choose to bump anyone with less seniority. Employees who bump to a lower-level position will go on a preferred list for their former title.

B) Retreat to a Former Title

Non-Competitive and Labor class employees and competitive class employees who are in

titles which have no lower-level direct promotion lines who cannot be offered a reassignment may be able to retreat to the position they last held permanently which is at a lower-level, if that title now exists and is occupied by an employee with less rights. As in "bumping" they can only retreat to the position now held by the least senior employee, and a probationer cannot retreat to a position held by an employee who has completed probation.

As in bumping, retreating employees go on a preferred

list for their former title.

By Civil Service Law all of these rights are limited by the "layoff unit" in which the abolition of the positions is taking place. That is, no employee can be offered a reassignment if title, or a bump or retreat to a position outside their layoff unit. In most cases, the layoff unit is the agency in which they work. However, some agencies are divided into two or more layoff units, usually by county.

Common Questions and Answers about Layoffs

[Q] How is my seniority date calculated?

[A] For layoff, your date of permanent

1

appointment in a classified service title and continuous service since that date determine your seniority date, except that veterans get 2 1/2 years, and disabled veterans 5 years added on to their seniority. This service may be broken by periods of less than one year and still be considered continuous. Time on leave or on a preferred list also counts as continuous service.

[Q] If I refuse a reassignment to my title at another location, do I still have rights to bump or retreat to a lower-level position?

[A] No. You will only be offered a reassignment if you have enough seniority to be retained while another employee must be laid-off.

If the reassignment was to a county other than where you now work, you can go on a preferred list.

[Q] Why can't I bump or retreat and take any job below me held by someone with less seniority?

[A] The Civil Service Law specifically states that a "displacing" employee may only take the position held by the least senior employee.

[Q] Can I bump or retreat to a title in another agency?

[A] No. Layoff rights, bumping and retreat take place only within the layoff unit where you are now employed.

[Q] If I'm on probation and have a hold item should I ask to go back to my hold item if I think I might be

laid-off?

[A] As a probationer, you always have a right to be restored to an item you are on leave from, but if you are laid-off you may also have additional rights to reassignment, bumping or retreat. Discuss your situation with your Personnel Officer.

[Q] My agency has asked me to choose to which counties I would accept reassignment, bumping or retreat without my knowing what jobs will eventually be available. Is this legal?

[A] Yes. Rule 5.5(b) of the Civil Service Law allows agencies to make binding agreements with employees on their willingness to accept such

opportunities in advance. Employees who do not indicate their choices will be considered to have declined all opportunities except those that may be available in the county where they now work.

[Q] Can non-permanent employees or less senior employees keep their jobs in other titles, while permanent employees in my title are reassigned or laid-off?

[A] Yes. Besides being limited to a layoff unit, layoffs are also limited to titles that have been specifically identified for reductions. If a title is not targetted for reductions, employees in that title are not affected.

[Q] If I refuse a reassignment or lower

level position, will I be able to collect Unemployment Benefits?

[A] The fact that you refused will probably not in itself affect your eligibility for unemployment benefits, it will be the reasons for your refusal that will count. You should discuss this with a representative in your local Employment Service office.

[Q] Where can I get more information about my layoff rights?

[A] The first place to go is your personnel office. You can also call the Department of Civil Service and ask to speak to the Staffing Services Section responsible for your agency, if the information you need concerns a situation specific

to your agency. The Department of Civil Service also has a toll free number 1-800-457-2973 for general layoff information.

[Q] If I am laid-off when will I know and what other information will I be given?

[A] If you are laid-off you will be sent a written notice at least three weeks before the date of layoff. You will also be provided with information on preferred lists and the effect of layoff on your health insurance, retirement, union insurance, etc. in booklet Information for Employees Separated from State Service.

[Q] If I accept a reassignment or bumping or retreat when will I go to

my new job?

[A] In most layoff situations, all reassignments, bumping, retreetat or layoffs occur on a specified date called the "date of layoff".

[Q] If I accept a reassignment in another location but after working there I decide I made a mistake and I resign, can I go on a preferred list?

[A] No. After the date of layoff, any employee who resigns will not be given preferred list rights for the title they have resigned from. Employees should chose carefully and make realistic decisions on locations where they will accept a job.

PART V

PREFERRED LIST ADMINISTRATION

PART V

PREFERRED LIST ADMINISTRATION

This Section will be transmitted at a later date.

PART VI
SYNOPSIS OF RELEVANT DETERMINATIONS

This Section will be transmitted at a
later date.

PART VII
APPENDICIES

A-355

(EEOC letterhead)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NEW YORK DISTRICT OFFICE
90 CHURCH STREET, ROOM 1501
NEW YORK, NEW YORK 10007
(212) 264-7188

May 19, 1986

Mr. George F. Kleinmann
749 New Scotland Avenue
Albany, New York 12208

Dear Mr. Kleinmann:

The Commissioners in Washington
voted against intervention by the EEOC in
your case.

The file has not yet been returned
here, so I am unable to explain the
reasons for the adverse decision.

Please accept my best wishes for
success of your endeavors.

Very truly yours,

/s/ Ann Thacher Anderson
Ann Thacher Anderson
Senior Trial Attorney

ATA:sw

UNITED STATES DISTRICT COURT
NORTHER DISTRICT OF NEW YORK

GEORGE KLEINMANN,

Plaintiff,

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Applicant For
Intervention,

85 CV 519
(Judge
Miner)

vs.

MOTION FOR
LEAVE TO
INTERVENE
AS
PLAINTIFF

MARIO CUOMO, as Governor of
the State of New York, THE
STATE OF NEW YORK and ARTHUR
Y. WEBB, as Commissioner of
the New York State Office of
Mental Retardation and
Developmental Disabilities,

Defendants.

Pursuant to Rule 24(b) of the
Federal Rules of Civil Procedure, the
Equal Employment Opportunity Commission
("EEOC"), by its undersigned attorneys,
respectfully moves the Court for leave to

intervene as plaintiff in this action. In support of its motion, the Commission alleges:

1. This action includes claims under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. Sec. 621 et. seq. ("ADEA").

2. The EEOC is an agency of the United States of America charged with the administration and enforcement of the ADEA. See Sections 6, 7, 8 and 9 of the ADEA, 29 U.S.C. Secs. 625, 626, 627 and 628, as amended by Section 2 of Reorganization Plan No. 1 of 1978, 92 Stat. 3781, and by Public Law 98-532 (1984), 98 Stat 2705.

3. The EEOC is expressly authorized to bring lawsuits on behalf of aggrieved individuals or in the public interest by

Section 7(b) of the ADEA, 29 U.S.C. Sec. 626(b), which incorporates by reference Sections 16(c) and 17 of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. Secs. 216(c) and 217.

4. This action was brought by an aggrieved individual on his own behalf. Under Rule 24(b), Fed. R. Civ. P., intervention may be permitted when an applicant's claim and the main action have a question of law or fact in common. The rule also provides that when a party to the action relies upon a statute administered by a federal agency, the agency upon timely application may be permitted to intervene.

5. If the EEOC is permitted to intervene as a plaintiff, its complaint would present material facts and

questions of law already at issue in the pleadings filed to date insofar as those pleadings treat the ADEA. The EEOC does not seek intervention as to issues extraneous to the ADEA.

6. Participation by the EEOC will neither prejudice the interests of the original parties nor result in any delay of proceedings. The EEOC as plaintiff offers this Court expertise acquired through enforcement of the ADEA, and hopes to help the parties in resolving the underlying dispute.

WHEREFORE the EEOC respectfully asks the Court to grant its motion for leave to intervene as a plaintiff. A proposed Complaint and a supporting Memorandum of

Law accompany this motion.

Dated: New York, N.Y. 1985

Respectfully Submitted,

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

JOHNNY J. BUTLER
Acting General Counsel

ROBERT L. WILLIAMS
Regional Attorney

ANN THACHER ANDERSON
Senior Trial Attorney

(EEOC letterhead)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NEW YORK DISTRICT OFFICE
90 CHURCH STREET, ROOM 1501
NEW YORK, NEW YORK 10007
(212)264-7188

October 19, 1987

Melissa J. Smallacombe, Esq.
Roemer and Featherstonhaugh, P.C.
Capital Center
99 Pine Street
Albany, New York 12207-2734

Re: Freedom of Information Act
Request No. 87-04-FOIA-101-NY
87-07-FOIA-172-NY

Dear Ms. Smallacombe:

This is in response to your request
for access to the Equal Employment
Opportunity Commission file Kleinman,
Edward v. Office of Mental Retardation &
Developmental Disabilities, Charge No.
023-84-0469, under the Freedom of
Information Act.

A-362

Your request is granted with the following exceptions. Access to all the Investigator's notes and memoranda, Attorney's notes, the log of Investigative/settlement actions, is denied pursuant to the Freedom of Information Act 5 U.S.C. Sec. 552(b)(5).

The fifth exemption provides that an agency may withhold records which are:

(5) inter-agency or intra-agency memorandums or letters which would not be available bylaw to a party other than an agency in litigation with the agency.

This exemption covers internal communications within the executive branch of the government to the extent that they are deliberative.

Renegotiation Board v. Grumman Aircraft Engineering Corp., 421 U.S. 168 (1975);

1

NLRB v. Sears Roebuck & Co., 421 U.S. 132 (1975). The exemption is designed to protect the decision-making processes of government agencies, and permits an agency to withhold information if it was prepared prior to an agency's decision and for the purpose of assisting the agency decision maker. Montrose Chemical Corp. v Train, 491 F.2d 63 (D.C. Cir. 1974). The documents listed above fall within this exemption since they are crucial to the Commission's deliberative process.

-2-

Documents to which access is granted are enclosed. Please mail a check made out to the U.S. Department of Treasury in the amount of \$48.20. Mail to the

A-364

attention of Ms. S. Washington, the above address. Payment will cover costs incurred in handling your request. See 29 CFR 1610.15.

If you wish to appeal the partial denial of your request, you may do so within 30 days after receipt of this letter by writing to the Chairman, Equal Employment Opportunity Commission, 2401 "E" Street, N.W., Washington, D.C. 20507. You must attach this letter to your appeal letter. Your appeal would be governed by the provisions of 29 C.F.R. Sec. 1610.11.

Sincerely,

Robert L. Williams
Regional Attorney

RLW: JB/sw

NEW YORK STATE CIVIL SERVICE LAW

SECTION 80

§80. SUSPENSION OR DEMOTION UPON THE
ABOLITION OR REDUCTION OF
POSITIONS

1. Suspension or demotion. Where, because of economy, consolidation or abolition of functions, curtailment of activities or otherwise, positions in the competitive class are abolished or reduced in rank or salary grade, suspension or demotion, as the case may be, among incumbents holding the same or similar positions shall be made in the inverse order of original appointment on a permanent basis in the classified service in the service of the governmental jurisdiction in which such

abolition or reduction of positions occurs, subject to the provisions of subdivision seven of section eighty-five of this chapter; provided, however, that the date of original appointment of any such incumbent who was transferred to such governmental jurisdiction from another governmental jurisdiction upon the transfer of functions shall be the date of original appointment on a permanent basis in the classified service in the service of the governmental jurisdiction from which such transfer was made. Notwithstanding the provisions of this subdivision, however, upon the abolition or reduction of positions in the competitive class, incumbents hold the same or similar positions who have not completed their probationary service

shall be suspended or demoted, as the case may be, before any permanent incumbents, and among such probationary employees the order of suspension or demotion shall be determined as if such employees were permanent incumbents.

1-a. Notwithstanding the provisions of subdivision one of this section, the members of a police or paid fire department in the city of Buffalo shall be subject to the following procedure. Where, because of economy, consolidation or abolition of functions, curtailment of activities or otherwise, positions in the competitive class are abolished or reduced in rank or salary grade, suspension or demotion, as the case may be, among incumbents holding the same or similar positions shall be made in the

inverse order of original appointment on a permanent basis in the grade or title in the service of the governmental jurisdiction in which such abolition or reduction of positions occurs, subject to the provisions of subdivision seven of section eighty-five of this chapter. Notwithstanding the provisions of this subdivision, however, upon the abolition or reduction of positions in the competitive class, incumbents holding the same or similar positions who have not completed their probationary service shall be suspended or demoted, as the case may be, before any permanent incumbents, and among such probationary employees the order of suspension or demotion shall be determined as if such employees were permanent incumbents.

1-b. Notwithstanding the provisions of subdivision one of this section, employees of secure detention facilities in the city of New York and of the alternatives to secure detention facilities program in such city who are performing functions which were assumed by the department of social services in the city of New York on the tenth day of November, nineteen hundred seventy-one and who, upon such assumption were transferred to said department, shall be subject to the following procedure. Where, because of economy, consolidation or abolition of function, curtailment of activities or otherwise, positions in the competitive class are abolished, or reduced in rank or salary grade, suspension or demotion, as the case may

be, among incumbents holding the same or similar positions shall be made in the inverse order of original appointment on a permanent basis in the classified service in the service of the governmental jurisdiction in which such abolition or reduction of positions occurs, subject to the provisions of subdivision seven of section eighty-five of this chapter; provided, however, that if any person so employed and so transferred was employed on a permanent basis in such a facility or such program prior to the thirtieth day of December, nineteen hundred sixty-seven, for purposes of this subdivision regarding priority of retention and for no other purpose, the date of original appointment of any such person shall be deemed to be

the date such permanent employment commenced prior to the said thirtieth day of December, nineteen hundred sixty-seven.

2. Continuous service. Except as otherwise provided herein, for the purposes of this section the original appointment of an incumbent shall mean the date of his first appointment on a permanent basis in the classified service followed by continuous service in the classified service on a permanent basis up to the time of the abolition or reduction of the competitive class positions. An employee who has resigned and who has been reinstated or reappointed in the service within one year thereafter shall, for the purposes of this section, be deemed to have

continuous service. An employee who has been terminated because of a disability resulting from occupational injury or disease as defined in the workmen's compensation law and who has been reinstated or reappointed in the service thereafter shall be deemed to have continuous service. A period of employment on a temporary or provisional basis, or in the unclassified service, immediately preceded and followed by permanent service in the classified service, shall not constitute an interruption of continuous service for the purposes of this section; nor shall a period of leave of absence without pay pursuant to law or the rules of the civil service commission having jurisdiction, or any period during which an employee is

suspended from his position pursuant to this section, constitute an interruption of continuous service for the purposes of this section.

3. Interrupted service. A state employee who has resigned and who has been reinstated or reappointed in the service more than one year thereafter shall be credited with any previous state service rendered prior to his or her resignation to which he or she would have been entitled for the purposes of this section but for such resignation; provided, however, that any time out of the service exceeding three years shall be subtracted from the employee's previous state service. In such instances, continuous service shall be deemed to have begun on the date which

precedes the otherwise applicable date for the commencement of continuous service by the period of actual creditable service provided by this subdivision.

4. Units for suspension or demotion in civil divisions. Upon the abolition or reduction of positions in the service of a civil division, suspension or demotion shall be made from among employees holding the same or similar positions in the entire department or agency within which such abolition or reduction of position occurs. In a city having a population of one million or more, the municipal civil service commission may, by rule, designate as separate units for suspension and demotion under the

provisions of this section any hospital or institution or any division of any department or agency under its jurisdiction. Upon the abolition or reduction of positions in such service, suspension or demotion, as the case may be, shall be made from among employees holding the same or similar positions in the department wherein such abolition or reduction occurs, except that where such abolition or reduction occurs in such hospital or institution or division of a department designated as a separate unit for suspension or demotion, suspension or demotion shall be made from among incumbents holding the same or similar positions in such separate unit.

4-a. For purposes of determining units for suspension or demotion in the city of Niagara Falls, the following

A-365(11)

three units shall be deemed to constitute departments within the meaning of subdivision three above: (i) members of the police department employed as auxiliary policewomen, police officers, police dispatchers or communications technicians, police lieutenants, chief communications officer, or police captains; (ii) members of the fire department employed as firefighters, fire alarm operators, fire captains, battalion fire chiefs or master mechanic-chief of apparatus; and (iii) all other employees of the city of Niagara Falls, in the competitive class.

5. Units for suspension or demotion in the state service. The president may, by regulation, designate as separate units for suspension or

demotion under the provisions of this section any state hospital, institution or facility or any division of any state department or agency or specified hospitals, institutions and facilities of a single state department or agency within a particular geographic area as determined by the president. Upon the abolition or reduction of positions in the state service, suspension or demotion, as the case may be, shall be made from among employees holding the same or similar positions in the department wherein such abolition or reduction occurs, except that where such abolition or reduction occurs in a separate unit for suspension or demotion designated by regulation of the president, suspension or demotion shall

be made from among incumbents holding the same or similar positions in such separate unit.

6. Displacement in civil divisions. A permanent incumbent of a position in a civil division in a specific title to which there is a direct line of promotion who is suspended or displaced pursuant to this section, together with all other such incumbents suspended or displaced at the same time, shall displace, in the inverse order of the order of suspension or demotion prescribed in subdivisions one and two of this section, incumbents serving in positions in the same lay-off unit in the next lower occupied title in direct line of promotion who shall be displaced in the order of suspension or demotion

prescribed in subdivisions one and two of this section; provided, however, that no incumbent shall displace any other incumbent having greater retention standing. If a permanent incumbent of a position in a civil division is suspended or displaced from a position in a title for which there are no lower level occupied positions in the direct line of promotion, he shall displace the incumbent with the least retention right pursuant to subdivisions one and two of this section who is serving in a position in the title in which the displacing incumbent last served on a permanent basis prior to service in one or more positions in the title from which he is suspended or displaced, if: (1) the service of the displacing incumbent while

in such former title was satisfactory and (2) the position of the junior incumbent is in (a) the competitive class, (b) the layoff unit from which the displacing incumbent was suspended or displaced, and (c) a lower salary grade than the position from which the displacing incumbent is suspended or displaced; provided, however, that no incumbent shall displace any other incumbent having greater retention standing. Refusal of appointment to a position afforded by this subdivision constitutes waiver of rights under this subdivision with respect to the suspension or displacement on account of which the refused appointment is afforded. The municipal civil service commission shall promulgate rules to implement this subdivision

including rules which may provide adjunctive opportunities for displacement either to positions in direct line of promotion or to formerly held positions; provided, however, that no such rule shall permit an incumbent to displace any other incumbent having greater retention standing. For the purpose of acquiring preferred list rights, displacement pursuant to this subdivision is the equivalent of suspension or demotion pursuant to subdivision one of this section.

7. Displacement in the state service. A permanent incumbent of a position in the state service in a specific title to which there is a direct line of promotion who is suspended or displaced pursuant to this section,

together with all other such incumbents suspended or displaced at the same time, shall displace, in the inverse order of the order of suspension or demotion prescribed in subdivisions one and two of this section, incumbents serving in positions in the same layoff unit in the next lower occupied title in direct line of promotion who shall be displaced in the order of suspension or demotion prescribed in subdivisions one and two of this section; provided, however, that no incumbent shall displace any other incumbent having greater retention standing. If a permanent incumbent of a position in the state service is suspended or displaced from a position in a title for which there are no lower level occupied positions in direct line

of promotion, he shall displace the incumbent with the least retention right pursuant to subdivisions one and two of this section who is serving in a position in the title in which the displacing incumbent last served on a permanent basis prior to service in one or more positions in the title from which he is suspended or displace, if: (1) the service of the displacing incumbent while in such former title was satisfactory and (2) the position of the junior incumbent is in (a) the competitive class, (b) the layoff unit from which the displacing incumbent was suspended or displaced, and (c) a lower salary grade than the position from which the displacing incumbent is suspended or displaced; provided, however, that no incumbent

shall displace any other incumbent having greater retention standing. Refusal of appointment to a position afforded by this subdivision constitutes waiver of rights under this subdivision with respect to the suspension or displacement on account of which the refused appointment is afforded. The state civil service commission shall promulgate rules to implement this subdivision including rules which may provide adjunctive opportunities for displacement either to positions in direct line of promotion or to formerly held positions; provided, however, that no such rules shall permit an incumbent to displace any other incumbent having greater retention standing. For the purpose of acquiring preferred list rights, displacement

pursuant to this subdivision is the equivalent of suspension or demotion pursuant to subdivision one of this section.

8. Certain suspensions in cities of one million or more for reasons of economy. Notwithstanding the provisions of any other general or local law, administrative code or ordinance, in cities having a population of one million or more, any member employed in the uniformed or non-uniformed services of such city who was suspended on or after July first, nineteen hundred seventy-five, because of economy measures taken by such city, and who returns to such service, shall be deemed to have been in continuous service in determining seniority and length of service

regardless of the duration of such suspension; provided, however, that for retirement purposes, a member receiving such service credit shall pay into the annuity savings fund of the retirement system the amount of the employee contributions required to have been paid into the retirement system for such service, within one year after this subdivision shall have taken effect. For the purposes of this subdivision "uniformed services" shall mean and include any uniformed force or service the members of which are paid in whole or part by such city.

9. Certain suspensions or demotions in the city of Niagara Falls. Notwithstanding the provisions of subdivision one of this section, the

members of a paid fire department in the city of Niagara Falls shall be subject to the following procedure. Where, because of economy, consolidation or abolition of functions, curtailment of activities or otherwise, positions in the competitive class are abolished or reduced in rank or salary grade, suspension or demotion, as the case may be, among incumbents holding the same or similar positions shall be made in the inverse order of original appointment on a permanent basis in the grade or title in the service of the governmental jurisdiction in which such abolition or reduction of positions occurs, subject to the provisions of subdivision seven of section eighty-five of this chapter. Notwithstanding the provisions of this subdivision, however,

upon the abolition or reduction of positions in the competitive class, incumbents holding the same or similar positions who have not completed their probationary service shall be suspended or demoted, as the case may be, before any permanent incumbents, and among such probationary employees the order of suspension or demotion shall be determined as if such employees were permanent incumbents.

JAN 9 1992

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States**October Term, 1991****GEORGE KLEINMANN,***Petitioner,**against*

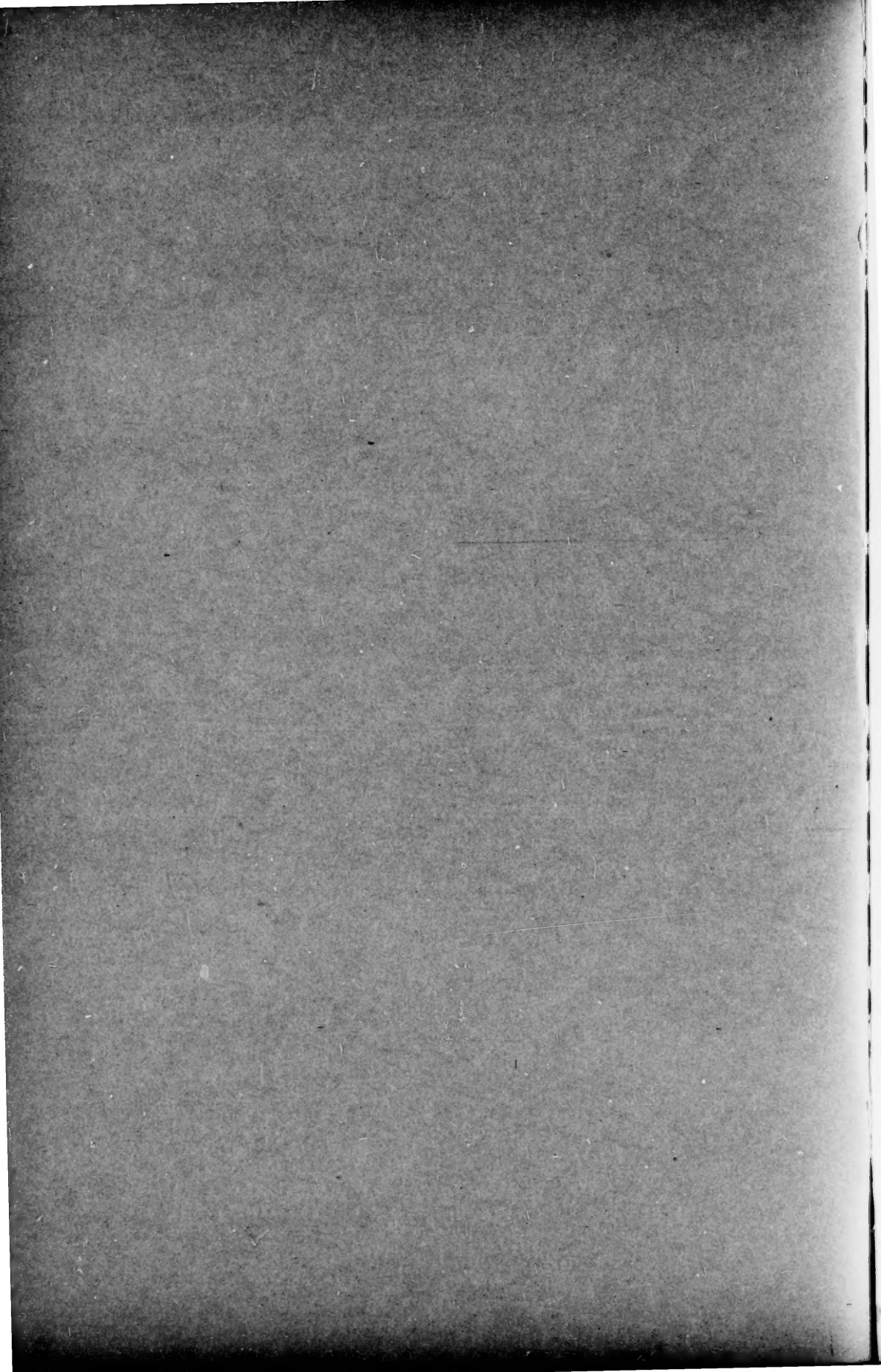
MARIO CUOMO, as Governor of the State of New York, THE
STATE OF NEW YORK and ARTHUR Y. WEBB, as Com-
missioner of the New York State Office of Mental Retarda-
tion and Developmental Disabilities,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF IN OPPOSITION

ROBERT ABRAMS*Attorney General of the State of New
York, Attorney for Respondents***The Capitol****Albany, NY 12224****(518) 474-8101****JERRY BOONE****Solicitor General***PETER H. SCHIFF***Deputy Solicitor General***LEW A. MILLENBACH***Assistant Attorney General**Of Counsel****Counsel of Record****Dated: January 8, 1992**



i.

Counterstatement of Question Presented

Whether the court below properly decided this case in accordance with accepted federal law and procedures.

Table of Contents.

| | Page |
|--|------|
| Counterstatement of Question Presented | i |
| Counterstatement of the Case | 2 |
| Reasons for Denying the Writ | 4 |
| 1. The Second Circuit did not sanction a departure from the accepted and usual course of judicial proceedings. | 4 |
| 2. The Court of Appeals decision does not conflict with any decisions of this Court or any other Circuit Court of Appeals. | 8 |
| CONCLUSION. For the reasons stated, the petition for a writ of certiorari should be denied. | 10 |

TABLE OF AUTHORITIES.

CASES:

| | |
|---|---|
| Cardinale v. Louisiana, 394 US 437 (1969) | 5 |
| Graver Mfg. Co. v. Linde Co., 336 US 271 (1949) | 8 |
| Griggs v. Duke Power Co., 401 US 424 (1971) | 8 |
| Johnson v. Univ. of Pittsburgh, 435 F Supp. 1328 (DC Pa 1977) | 6 |
| McDonnell Douglas Corp. v. Green, 411 US 792 (1973) | 8 |
| Texas Dept. of Community Standards v. Burdine, 450 US 248 (1981) | 8 |

| | Page |
|--|------|
| United States v. Johnston, 268 US 220 (1925) | 8 |
| FEDERAL STATUTES: | |
| 29 USC § 621, <i>et seq.</i> | 2 |
| § 706 | 2 |
| FEDERAL RULES: | |
| Federal Rules of Appellate Procedure, Rule 35. | 4, 7 |
| Federal Rules of Appellate Procedure, Rule 40. | 4, 7 |
| NEW YORK STATUTES: | |
| Civil Service Law § 63 | 9 |

No. 91-775

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991.

GEORGE KLEINMANN,

Petitioner,

against

MARIO CUOMO, as Governor of the State of New York, THE
STATE OF NEW YORK and ARTHUR Y. WEBB, as Commis-
sioner of the New York State Office of Mental Retardation
and Developmental Disabilities,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF IN OPPOSITION

Respondents respectfully request this Court to deny the petition for a writ of certiorari seeking to review the actions and opinion of the United States Court of Appeals for the Second Circuit. The actions of the Court of Appeals were in all respects proper, and the Court of Appeals' opinion does not conflict with any decisions of this Court or any other Circuit Court of Appeals.

Counterstatement of the Case

This action was commenced on April 17, 1987, in the United States District Court, Northern District of New York against the Governor of the State of New York and the former Commissioner of the New York State Office of Mental Retardation and Developmental Disabilities ("OMRDD") premised upon a claim that the petitioner was laid off because of his age in violation of the Age Discrimination in Employment Act ("ADEA"). 29 USC § 621 *et seq.* Further, the petitioner alleged that the respondents' actions in reassigning him to his former supervisor caused him to suffer severe physical and emotional anxiety, that respondents' failure to accommodate his disability violated the Rehabilitation Act of 1973 (29 USC § 706), and that his subsequent layoff was in retaliation for a claim of discrimination which he had made to OMRDD and to the EEOC (A366-A387).¹

The case came on for trial without a jury before Hon. Con G. Cholakis, District Judge. The court dismissed the Rehabilitation Act claim at the close of petitioner's case (A574).

After the testimony of respondents' witnesses and rebuttal testimony by petitioner, the court rendered a bench decision on June 13, 1989, dismissing the complaint in its entirety (A2-A14). In ruling as it did the District Court found that the respondents "established a legitimate non-discriminatory reason for the [petitioner's] discharge which the [petitioner] has not proven was a pretext for the [alleged] discrimination" (A13).

Petitioner appealed and the matter was fully briefed and argued before a panel of the United States Court of Appeals for the Second Circuit. By a summary order filed on January

¹ Unless otherwise noted, numbers in parentheses preceded by the letter "A" are references to the pages of the Appendix to the petition.

18, 1990, the court remanded the case to the District Court for findings of fact and conclusions of law as to petitioner's cause of action alleging retaliation, particularly with regard to a claim by him that he was refused permission "to accept on April 7, 1983 a position that OMRDD allegedly offered him on March 18, 1983" (A16). The Court of Appeals retained jurisdiction of the matter.

By decision dated June 20, 1990 the District Court issued its findings of fact and conclusions of law (A18-A29). As relevant, the District Court found that the petitioner's line item number and title had been identified for abolition before the petitioner filed a charge of age discrimination and that the abolition of his position was therefore not in retaliation for such charge (A23-A25). The court found additionally that the petitioner's failure to obtain the position allegedly offered to him on March 18, 1983 was due to his own indecision and was not an act of retaliation by officials at OMRDD (A26).

The case was again fully briefed by the parties and was resubmitted to the Court of Appeals without oral argument. By a summary order dated January 3, 1991, the Court of Appeals affirmed the judgment of the District Court (A30-A35). As relevant, the court ruled that there was ample evidence in the record to show that petitioner's position had been abolished, and that the District Court did not commit error in relying on that evidence (A33). The Court of Appeals ruled additionally that the District Court properly considered whether the circumstances showed that age was a factor in petitioner's discharge, that there was ample support in the record for the District Court's finding that petitioner was denied the position offered to him on March 18, 1983 because he failed to accept it until after the offer was withdrawn, and that the District Court did not erroneously hold that petitioner's employer's compliance with the New York State Civil Service Law insulated it from liability under the ADEA (A33-A34).

Petitioner subsequently filed a petition for reargument which was denied by the Court of Appeals in an order filed February 27, 1991 (A36-A37). Quite contrary to petitioner's assertions in his petition for a writ of certiorari (Petition, pp 5, 40-42), an examination of the Court of Appeals' order reveals quite clearly that the court treated the petitioner's motion as one for a rehearing pursuant to Federal Rules of Appellate Procedure, Rule 40, and denied it as such (A36), and did not treat it simply as a suggestion for a hearing or rehearing in banc, made pursuant to Federal Rules of Appellate Procedure, Rule 35 (A37). Petitioner now seeks a writ of certiorari in this Court.

REASONS FOR DENYING THE WRIT

1. The Second Circuit did not sanction a departure from the accepted and usual course of judicial proceedings.

The petitioner contends at Point I of his brief that the Court of Appeals sanctioned a departure from the accepted and usual course of judicial proceedings in six respects, thereby warranting intervention by this Court. In fact, the practices and procedures followed by the Court of Appeals were entirely proper, as the following discussion will demonstrate. We will address the petitioner's arguments *seriatim*.

A. The petitioner argues first (Petition, pp 26-30) that the District Court improperly denied a request by him, made at the close of his case, for a continuance for the purpose of obtaining other counsel. This argument is raised for the first time in this Court and was not addressed to the Court of Appeals notwithstanding the fact that petitioner's current counsel fully briefed this matter the second time it was presented to the Court of Appeals. Under these circumstances, we submit that any complaint which the petitioner may have had in regard to the denial of his request for a continuance has been waived and

cannot properly form the basis of a review by this Court. Cf. *Cardinale v. Louisiana*, 394 US 437, 439 (1969).

Moreover, an examination of the relevant transcript pages (A501-A514) reveals that the District Court carefully questioned the petitioner concerning the reasons why he wished to obtain other counsel and denied the request for a continuance only after it became obvious that no valid reason for the requested delay existed. Given the fact that at the time the request was made virtually the whole of the petitioner's case had been presented, and that the petitioner was unable to articulate any good reason why the request should have been granted, we submit that the District Court did not act improperly in denying petitioner's request for a continuance and that further review based upon this ground is not therefore warranted.

B. The petitioner argues next (Petition, pp 31-38) that certiorari is warranted because one of the District Court's law clerks was married to an attorney who was employed by the New York State Attorney General's office during the time that the trial of this matter was being conducted before the District Court. Although this fact was known to petitioner's current counsel before the matter was presented to the Court of Appeals for the second time (Petition, pp 31-32), this argument was not raised in the Court of Appeals and is presented in this Court for the first time. We submit that under these circumstances the issue is not ripe for review by this Court and that the petitioner has waived any argument which he might have had in regard to the issue. And this is especially so since the petitioner has not presented the slightest proof that the law clerk referred to worked on this matter during the time she worked for Judge Cholakis, or that she even discussed the matter with her husband. Therefore review by this Court based upon this argument is not warranted.

C. The petitioner's third contention (Petition, pp 39-40) is that the District Court failed to accord any weight to a finding of violation by the EEOC and that by failing to explain why it declined to accord any weight to the decision the District Court effectively precluded the petitioner from attaining a complete and proper appellate review. On the second occasion that this matter was presented to the Court of Appeals, the petitioner argued that the District Court erred in failing to accept the decision of EEOC that a violation of ADEA had occurred. Respondents vigorously resisted this argument, noting that a finding of violation by the EEOC is not binding upon the courts and that a trial *de novo* on the issue is required. *Johnson v. Univ. of Pittsburgh*, 435 F Supp 1328 (DC Pa 1977). Therefore, contrary to the petitioner's assertions in his petition for a writ of certiorari, this issue was fully presented to the Court of Appeals, which had every opportunity to consider the parties' arguments and to assess the propriety of the District Court's decision in light of those arguments. The mere fact that the petitioner is unhappy with the manner in which the Court of Appeals decided the issue does not present a valid ground for review by this Court.

Moreover, the very fact that the District Court engaged in an examination of the respondents' evidence notwithstanding its express finding that that scenario described by the petitioner did not necessarily give rise to an inference of age discrimination (A11), provides strong inferential evidence that the District Court did accord some weight to the decision by EEOC. Under these circumstances, the granting of certiorari based upon this ground is not warranted.

D. The petitioner's fourth contention (Petition, pp 40-42) is that the Court of Appeals failed to render a decision with respect to his motion for reargument, thus warranting intervention by this Court. As we have pointed out in the Counterstatement of the Case (*ante*, p 4), the petitioner is incorrect in his assertion that the Court of Appeals did not issue a ruling with

regard to his motion for reargument. An examination of the Court of Appeals' order reveals quite clearly that the court properly treated the petitioner's motion as one for a rehearing pursuant to Federal Rules of Appellate Procedure, Rule 40, and decided it as such, and did not treat it simply as a suggestion for a hearing or rehearing *in banc* made pursuant to Federal Rules of Appellate Procedure, Rule 35 (A36-A37). Therefore, review by this Court based upon this ground is not warranted.

E. The petitioner's fifth contention (Petition, pp 42-44) is that following remand by the Court of Appeals, the District Court should not merely have rendered findings of fact and conclusions of law as to petitioner's cause of action alleging retaliation, as directed by the Court of Appeals (A15-A17), but should have conducted "a trial de novo" as to the correctness of the decisions made by the state agencies (Petition, p 43). Petitioner ignores that there had been a full trial and that the remand was for a limited purpose. In its order remanding the matter to the District Court, the Court of Appeals explicitly ruled that it would retain jurisdiction of the matter pending the issuance of findings by the District Court (A16). Therefore, the petitioner's assertion that a valid ground for intervention by this Court exists because the District Court did not go beyond the remand is totally without merit.

F. The petitioner's final contention (Petition, pp 44-46) is simply to the effect that the lower courts erred in concluding that the petitioner's position had been abolished because the petitioner's name and line item did not appear on a form which was introduced into evidence by the petitioner. However, as explicitly found by the District Court (A23), and as held by the Court of Appeals in its affirmance (A33), there exists ample other evidence in the record showing that petitioner's position had in fact been abolished. At base the petitioner is requesting this Court to intervene in this matter solely because he is unhappy with the manner in which the lower courts resolved

an issue of fact. That is not a proper subject for review by this Court, and certiorari based upon this ground should consequently be denied. *See, e.g., United States v. Johnston*, 268 U.S. 220, 227 (1925); *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949).

2. The Court of Appeals decision does not conflict with any decisions of this Court or any other Circuit Court of Appeals.

Although asserting at Point II of his petition that the decision of the Court of Appeals is in conflict with the rulings of this Court and other Circuit Courts of Appeal concerning the issue of age discrimination, an examination of the petitioner's arguments in this regard reveals that the substance of his complaint is nothing more than that he disagrees with the factual conclusions reached by the lower courts concerning his claim that he was terminated from his employment because of his age. Such factual claims do not present a sufficient ground for review by this Court. *See, United States v. Johnston, supra; Graver Mfg. Co. v. Linde Co., supra.*

The record in this case reveals that the District Court correctly apportioned the various burdens of proof and persuasion among the parties as required by the cases and that the petitioner simply failed to meet his ultimate burden of proving that his employment was terminated because of his age. *See, Griggs v. Duke Power Co.*, 401 US 424 (1971) (once a plaintiff has established a *prima facie* case of discrimination, the burden shifts to the employer to articulate a legitimate, business-related, non-discriminatory reason for its decision to terminate, or not to hire or promote him); *Texas Dept. of Community Standards v. Burdine*, 450 US 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 US 792 (1973) (where the employer has produced evidence tending to meet that burden, the plaintiff must show that the reasons proffered by the

employer are merely a pretext to cloak a discriminatory motive).

In affirming the District Court's decision, the Court of Appeals concluded that there was ample evidence in the record to support the District Court's finding that the petitioner had not been the subject of discrimination and that the District Court did not commit any errors of law concerning its interpretation and application of ADEA (A30-A35). The petitioner has wholly failed to demonstrate in what manner the decision of the Court of Appeals conflicts with any decision of this Court or any other Circuit Court of Appeals, and has failed to come forward with any other good reason why review of the Court of Appeals' decision by this Court is warranted.² The petition for certiorari should therefore be denied.

²The petitioner's repeated reference to vacant, "funded", positions (Petition, pp 19, 21-22, 48), which he claims could have been eliminated, thereby effecting the same budgetary savings as were effected by reason of the abolition of his position, overlooks the fact that even though the positions were "funded", there was no actual expenditure of funds because they were vacant. Moreover, the positions referred to were located in a different layoff unit than that occupied by the petitioner, and were retained simply because the incumbents had received promotions and were entitled, under the law, to return to them at any time during their probationary period in the higher titles. New York Civil Service Law § 63.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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